



Panel I: Legal Issues in Sports Security

Citation

Richard H. Fallon, Jr., Milton Ahlerich, Norman Siegel, William D. Squires, Paul H. Zoubek and Laura Freedman, Panel I: Legal Issues in Sports Security, 13 Fordham Intell. Prop. Media & Ent. L.J. 349 (2003).

Published Version

<http://ir.lawnet.fordham.edu/iplj/vol13/iss2/1/>

Permanent link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:12933362>

Terms of Use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#).

[Accessibility](#)

Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 13, Issue 2

2003

Article 1

VOLUME XIII BOOK 2

Panel I: Legal Issues in Sports Security

Richard H. Fallon, Jr.*

Milton Ahlerich[†]

Norman Siegel[‡]

William D. Squires**

Paul H. Zoubek^{††}

Laura Freedman^{‡‡}

*Harvard Law School

[†]National Football League

[‡]Freedom Legal Defense and Education Project

**Giants Stadium

^{††}Montgomery, McCracken, Walker & Rhoads

^{‡‡}Fordham University School of Law

Copyright ©2003 by the authors. *Fordham Intellectual Property, Media and Entertainment Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/iplj>

PANEL I: Legal Issues in Sports Security

Moderator: Richard H. Fallon, Jr.^{*}

Panelists: Milton Ahlerich[†]
 Norman Siegel[‡]
 William D. Squires[§]
 Paul H. Zoubek^{||}

MS. FREEDMAN:[#] Our first panel this morning is entitled “Legal Issues in Sports Security.”

In the wake of the tragic events of September 11th,¹ security has been foremost in our minds. While the measures that have been taken in response have enabled us to continue on with our

^{*} Professor, Harvard Law School. A.B., Yale University, 1975; B.A., Oxford University, Rhodes Scholar, 1977; J.D., Yale Law School, 1980.

[†] Vice President of Security, National Football League. Assistant Director in Charge of Public Affairs; Assistant Director in Charge of the FBI Lab, Federal Bureau of Investigation, 1970–95. B.A., Kansas State University, 1968.

[‡] Executive Director, Freedom Legal Defense and Education Project. Executive Director, New York Civil Liberties Union, 1985–2001. B.A., Brooklyn College, 1965; J.D., New York University School of Law, 1968.

[§] Vice President and General Manager, Giants Stadium. Commander, United States Naval Reserves. Director of Stadium Operations, Cleveland Browns Stadium, 1999–2000. General Manager, Disney’s Wide World of Sports, 1996–99. Director of Stadium Operations, New Jersey Sports and Exposition Authority, 1990–96. Director of Stadium Operations, Yankee Stadium, 1987–90. B.A., United States Naval Academy, 1975.

^{||} Of Counsel, Montgomery, McCracken, Walker & Rhoads. Counsel, New Jersey Domestic Preparedness Task Force. First Assistant Attorney General, New Jersey Department of Law and Public Safety, 1999–2001. Director, New Jersey Division of Criminal Justice, 1997–2000. Deputy Chief, New Jersey Division of Criminal Justice, 1987–97. Assistant U.S. Attorney, New Jersey, 1987–97. B.A., *cum laude*, Woodrow Wilson School of Public and International Affairs at Princeton University, 1978; J.D., New York University School of Law, 1982.

[#] Laura Freedman, Co-Symposium Editor, Fordham Sports Law Forum, Fordham University School of Law. B.A., University of Delaware, 2000; J.D. expected, Fordham University School of Law, 2003.

¹ See Robert D. McFadden, *After the Attacks: The Overview; Stunned Rescuers Comb Attack Sites, But Thousands Are Presumed Dead; F.B.I. Tracking Hijackers’ Movements*, N.Y. TIMES, Sept. 13, 2001, at A1.

everyday lives and provide us with a sense of safety, we must ask the cost of these measures. At what point do the heightened security measures impede upon our rights so much that they diminish the very democratic rights we are protecting?

This panel will examine such issues from the perspective of sports security. Our panelists today will brief us on the types of security measures being taken by sports leagues and venues and examine how have they responded to this new America. We will examine these measures and look at how in efforts to protect us, our legal rights may be even more at risk than ever.

Without further ado, "Legal Issues in Sports Security."

PROFESSOR FALLON: Thank you very much, Laura.

I am delighted to be here today. I think we have a fascinating panel.

I will now ask the panelists to speak in the following order: Milton Ahlerich, William Squires, Paul Zoubek, and finally Norman Siegel.

As I turn to Milton Ahlerich, I would ask him to deal with whatever issues he thinks would be of most interest to the audience, but I hope that in the course of his remarks he will talk about what he is currently worried about with respect to sports security, how his worries may have changed since September 11th, and what he is doing about his worries in the way of trying to ensure safety at sporting events.

MR. AHLERICH: Thank you, Professor. It is a real pleasure to be with you and have the opportunity to discuss these issues.

We have been very focused over the last six months on doing the very best job we could to provide safety and security for our fans, and this presents a terrific opportunity for me to step back, reflect, and discuss with you some of the issues that are evolving.

In my post as the Vice President of Security for the National Football League (NFL), we have a variety of security programs that deal with protecting our most important assets,² and our most

² See Thomas George, *N.F.L. Is Tightening Security As Games Resume on Sunday*, N.Y. TIMES, Sept. 18, 2001, at C18; Bob Glauber, *NFL Will Beef Up Security*, NEWSDAY (N.Y.), Sept. 18, 2001, at A42.

important assets are not only the game and the fans—certainly the events themselves are very, very high on the list—but also our most important human resources, our players.³ They are extremely important to us, and looking after them and being sure that we are doing everything that we can to protect them and to avoid issues with them is also part of my job.

In addition, we are looking at our most important business relationships and trying to be sure that those are good business relationships and that we are not doing business with people with whom we should not be doing business.

The integrity of the game is probably the highest thing on our list, next to event security, in terms of an important asset that the NFL wants to be sure stays in place.⁴ If you believe the game is fixed or you believe that people who are playing the game are betting, you will have a very poor opinion and you probably are not going to watch our games⁵ So the integrity of the game is an important asset. It is hard to manage.

After September 11th the idea of where event security fit into our mix was high on the list. If not the highest, it was certainly among the top two or three things that we did. Event Security immediately became, through pronouncement by our commissioner, the number one priority of the National Football

³ See Jason Wilde, *Security to Take Center Stage; Players, Officials, Fans on Alert in Wake of Terrorist Attacks*, WIS. STATE J., Sept. 24, 2001, at C1.

⁴ See Brian Peterson, *Security Is Job 1 With NFL's Ahlerich*, NFL INSIDER, 2002, <http://www.superbowl.com/xxxvi/ce/feature/0,3892,4897815,00.html> (last visited Mar. 16, 2003).

⁵ See generally *Molinas v. Nat'l Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961) (upholding then-National Basketball Association [NBA] president's decision to indefinitely suspend Jack Molinas, a popular basketball player in the 1950s, for placing bets on his team, the Pistons).

[I]n order to effectuate its important and legitimate policies against gambling, and restore and maintain the confidence of the public vital to its existence, . . . the league was justified in determining that it was absolutely necessary to avoid even the slightest connection with gambling, gamblers, and those who have done business with gamblers, in the future.

Id. at 244.

League.⁶ He said repeatedly that the NFL could stand a lot of mistakes; we could make a lot of bad business decisions, we could have bad business partners, we could have bad problems with our most important human resources, but we could not, perhaps, survive a terrorist attack or a large loss of life in one of our venues, at one of our games.⁷ That is a very strong statement.

The commissioner formed a task force to deal with security immediately and to make recommendations to him as well as to all of the owners as to what should be done to preserve and harden our events and make them safer.⁸ He appointed the Task Force of Stadium Security and Crowd Management Professionals. I was chair of the committee.⁹

Over an eight to ten week period the task force met and evolved into publishing a set of best practices for NFL stadiums and best practices for security [hereinafter "*Best Practices Guide*"].¹⁰ Those best practices, in turn, were provided to stadium managers and owners, recognizing that we do not have direct control over these venues.¹¹ These venues are owned by cities, states and in some instances, the team owners themselves.

⁶ See George, *supra* note 2 (quoting Ahlerich, explaining, "The commissioner said to the owners that the No. 1 priority is security and that we are not going to fall short in that area.").

⁷ See Ron Hurst et al., *American Sports As a Target of Terrorism: The Duty of Care After September 11th*, http://www.mmwr.com/_uploads/uploaddocs/publications/american%20sports%20as%20A%20TARGET%20of%20terrorism.pdf (last visited Mar. 25, 2003).

⁸ See Wilde, *supra* note 3 ("[C]ommissioner Paul Tagliabue convened a security task force this week—headed by Ahlerich, who spent [twenty-five] years with the FBI—and outlined a number of behind-the-scenes security measures.").

⁹ *Id.*

¹⁰ See Glauber, *supra* note 2; Hurst, *supra* note 7.

In the aftermath of September 11th, most leagues, teams and venues went through a comprehensive threat assessment and established updated security guidelines and practices to meet the increased threat. The National Football League [hereinafter NFL], by way of example, created a security task force and issued to teams a "*best practices guide*" [hereinafter *Best Practices Guide*] of recommended security measures before resuming play.

Nick Cafardo, *Patriots Plan to Play It Safe*, BOSTON GLOBE, Sept. 19, 2001, at E2.

¹¹ See, e.g., Cafardo, *supra* note 10 ("The NFL has issued guidelines to all teams on how to proceed with security . . ."); Hurst, *supra* note 7 ("The National Football League . . . created a security task force and issued to teams a [*Best Practices Guide*] of recommended security measures before resuming play.").

That is a commonly misunderstood thing about the NFL, the idea that it is a hierarchical organization and the Commissioner can decree what he wants done from Park Avenue. In actuality, he has limited authority in that area.¹² He can urge, he can write some policies, and if all the owners sign on to it, things can get done.¹³ And that is exactly what happened here with the *Best Practices Guide*.

Then we hired an independent security firm to put together what I would call an audit, for lack of a better description, to make an assessment of each stadium to see how they were doing in actually having best practices performed in their stadiums on non-game day and game day.¹⁴ This was an extensive review done by security professionals, not the NFL Security Department. We hope they are professional—I believe they are professional—and they have now been completed and sent back to the teams and will be provided to the stadiums to implement the recommendations to ensure that we are doing the very best that we can.

I want to underscore that doing this work, which is expensive, is not all—well, first and foremost, it is a business decision.¹⁵ This is business. These owners enjoy an important part of the American scene in entertainment and sports, but they are also in business, and it is important that their business be preserved. This is common sense. We are going to preserve our fans and take care of our fans.

The implementation of the recommendations will be an interesting project to watch how it goes. Mostly the stadiums have

¹² See, e.g., John Clayton, *Realignment Ended Up Being Fairly Easy for NFL*, ESPN, at http://espn.go.com/nfl/columns/clayton_john/1203162.html (May 22, 2002) (showing that a vote by NFL team owners is necessary to alter existing league structure or policy).

¹³ See, e.g., *id.* (noting that, due to NFL owners' willingness to compromise and bargain, it took only one hour to secure enough votes for the latest realignment of the thirty-two-team league into eight divisions).

¹⁴ See Ted Curtis, *Sept. 11 Made Many of Us Reassess*, 88 A.B.A. J. 39 (2002) (noting that Jeff Pash, the NFL's executive vice president and principal in-house counsel, hired an independent firm to audit each stadium's compliance with the anti-terrorism template).

¹⁵ See generally Hurst, *supra* note 7 (considering the prudence of assessing risks and developing industry best practices for sporting events in order to meet the duty of care for athlete and fan invitees in the wake of the September 11th tragedy).

been terrific at it.¹⁶ They have taken the *Best Practices Guide* and done a very good job—not that I am a judge of the stadiums. I am not. Mr. Squires will, I am sure, speak to this issue. He is a professional who runs stadiums.¹⁷ I have never run a stadium. We had some people on the task force who had.

The idea here was to make strong recommendations to the teams to implement these best practices to the extent possible. The balancing of the invasive efforts to protect our fans, what might be considered invasive by some, I think is an important area that needs to be discussed. How far can we go with physical searches? How much permission is needed as fans enter the stadium to protect the fans at large and our business? Our experience has been since September 11th enormous acceptance and help from the public and our fans. The complaints that we have received have been along two lines, if you were to characterize them. Number one: you are not doing enough; why are you not doing more?¹⁸ And number two: you are not consistent.¹⁹ We did not get that everywhere, but we would occasionally receive those complaints.

I will end with my comment as to our biggest concern in going forward, and that is very simple. It is complacency. We are vigilant and we are going to push as hard as we can to do the right thing to protect our fans, but we understand that complacency could be our largest issue as we go forward with our fans, stadium managers, owners, and those who would spend the money to make us more secure.²⁰

Thank you.

¹⁶ See, e.g., Tom Withers, *Browns Security Director Says Fans Safe*, HOLLAND SENTINEL (Mich.), Sept. 20, 2001, http://www.thehollandsentinel.net/stories/092101/spo_0921010055.shtml.

¹⁷ See generally *infra* notes 22–55 and accompanying text.

¹⁸ See David Firestone, *In Security Matters, Playing Field Is Level*, N.Y. TIMES, Feb. 4, 2002, at D8 (quoting an NFL fan enthusiastic about the extent of searches: “I’ve never been searched like this in my life—isn’t it great?”).

¹⁹ See *id.* (quoting an NFL fan who was concerned with consistency: “They said it was everybody, and it had better be.”).

²⁰ See Steve Cameron, *Venues Revisit Safety vs. Cost As September 11th Recedes*, STREET & SMITH’S SPORTS BUS. J., Mar. 11–17, 2002, at 1 (noting that as few as six months after the September 11th tragedies, some sports facility managers were considering decreasing or abandoning some of the enhanced security measures enacted to protect their venues against terrorism).

2003]

LEGAL ISSUES IN SPORTS SECURITY

355

PROFESSOR FALLON: Thank you very much.

Before we go to the next speaker, I wonder if you could just clarify one thing. That is, you said that the NFL has issued recommendations involving best practices.

MR. AHLERICH: Yes.

PROFESSOR FALLON: Then you also said that one of the big issues is how far it is appropriate to go, especially with respect to searches.

MR. AHLERICH: Yes.

PROFESSOR FALLON: What does the *Best Practices Guide* say about searches?

MR. AHLERICH: It recommends that for a bag, or any items required into the stadium, we would request and receive a consent search from all patrons as they would come in, all fans.²¹ That is recommended.

The idea is to have a strong, careful visual inspection of the patrons before they come in, as well as a touching or patting of the outer garments.

PROFESSOR FALLON: And if somebody refuses permission, then presumably that person does not get into the stadium?

MR. AHLERICH: That is correct.

PROFESSOR FALLON: Thank you very much.

So now, Mr. Squires, as with Milton Ahlerich, you have a lot of experience in the sports business and in stadium security, so I hope that you will talk about whatever you think would be most interesting to the audience, but I hope too that you will specifically respond to issues about how your concerns have changed since September 11th, what you are doing about those concerns, and maybe specifically what you are doing with the *Best Practices Guide* given to you by the NFL.

MR. SQUIRES: Sure.

²¹ Hurst, *supra* note 7 (noting that the NFL's *Best Practices Guide* recommends "use of hand held metal detectors and search of all small bags and personal items"). See also Eric Fisher, *NFL Promises 'Unprecedented' Commitment to Fan Safety*, WASH. TIMES, Sept. 21, 2001, at C10.

I am assuming we have all Jets and Giants fans in here, right? Any Cowboys fans? Do not identify yourself.

Giants Stadium is twenty-six years young this year.²² We have had 48 million people come through our gates.²³ I know this is a sports symposium, but we have had the Pope,²⁴ we have had more concerts than people can imagine,²⁵ we have Major League Soccer,²⁶ the North American Soccer League,²⁷ and the New Jersey Generals.²⁸

I like to think that my staff is probably the best in the business at what they do. Giants Stadium is the busiest non-baseball stadium in the country;²⁹ 2.63 million people came through our turnstiles last year,³⁰ the second-best year we have ever had. We netted about \$18 million.³¹ It was a great year for us.

²² New York Giants, *Game Day: Giants Stadium*, at <http://www.giants.com/facility> (last visited Mar. 25, 2003) (noting the date of the Giants' debut in Giants Stadium as Oct. 10, 1976).

²³ *Giants Stadium Fast Facts*, at <http://www.meadowlands.com/stadium/fastfacts.asp> (n.d.).

²⁴ See Glauber, *supra* note 2; Edward Wong, *Guard Is Up for Stadium Security Officials Across the Country*, N.Y. TIMES, Sept. 28, 2001, at D8 (noting that Giants Stadium already had a blueprint for heightened security, as measures had been enhanced during "the Persian Gulf War, a 1995 visit by Pope John Paul II and the 1994 World Cup").

²⁵ See, e.g., *Welcome to the Meadowlands Sports Complex*, Meadowlands, at www.meadowlands.com (n.d.). See the main page and "Event Calendar" for a schedule of competitions and concerts. *Id.*

²⁶ *Giants Stadium Fast Facts*, *supra* note 23 (noting the past and present tenants of Giants Stadium including the New York/New Jersey Metrostars (MSL)(1996–present), New Jersey Cosmos (NASL)(1977–85) and the New Jersey Generals (USFL)(1983–85)).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See John Brennan, *Turf's Up at the Meadowlands*, RECORD (Bergen County, N.J.), Dec. 31, 2002, at S5 (quoting George Zoffinger, president of the New Jersey Sports and Exhibition Authority: "Giants Stadium is the busiest stadium in the country with two NFL teams and a Major League Soccer team [the MetroStars] as well as numerous concerts and other events.").

³⁰ See NEW JERSEY SPORTS & EXPOSITION AUTHORITY, ANNUAL REPORT 20 (2001) (noting that the 2001 total attendance for Giants Stadium and Continental Arena Airlines combined was over 4 million), <http://www.njsea.com/Offers/pdf/NJSEA2001AnnRpt.pdf>.

³¹ See Associated Press, *Metro Briefing New Jersey: Trenton: State Aid for Meadowlands to Drop*, N.Y. TIMES, Nov. 19, 2001, at F4 (announcing 2001's net revenue at \$17.5 million).

2003]

LEGAL ISSUES IN SPORTS SECURITY

357

Before September 11th safety was our paramount concern, and it is even more paramount now, if you can believe that. I look at security as a good boxing referee: you know he is there, but you do not see him a lot.³²

Has anybody been to any events at Giants Stadium since September 11th?

AUDIENCE PARTICIPANTS: Yes.

MR. SQUIRES: What we have done is major deterrence.³³ As you come through the toll plazas, you see state police cars out there. We now do our checks outside the gates rather than inside the gates, and inside that corral area are state police.³⁴ When you come through the turnstiles, the first thing you see are state police cars. When you go to your seat, you see state police walking around the concourse, which is something we have not done before.³⁵ So it is a deterrent for anybody who may think that we might be an easy target.

It costs \$40,000 more per game to do that. There are other things that are included in that—which the Jets and the Giants do not participate in. The New Jersey Sports and Exposition Authority, which owns and governs Giants Stadium, pays for that.³⁶ But you cannot put a price tag on a life—well, I guess

³² See Glauber, *supra* note 2.

³³ See *id.*; Wong, *supra* note 24 (noting that Giants Stadium sits “across the Hudson River from the . . . World Trade Center” and commenting that for weekend football games, “There will be more people with guns and uniforms there . . . than at some minimum security prisons.”).

³⁴ See generally Wong, *supra* note 24 (explaining that “[t]he Meadowlands uses in-house security guards and the New Jersey State Police to staff events” and that their numbers would be increased and their presence would be more visible in response to the heightened security threat).

³⁵ See generally *id.*

³⁶ See New Jersey Sports and Exposition Authority, *Meadowlands Sports Complex Calculates \$3.2 Million Negative Impact From World Trade Center Attack*, at <http://www.njsea.com/SearchResult/SearchResultDetails.asp> (Nov. 28, 2001). See also Leonard Shapiro, *NFL Is Making Plans for Super Bowl Security*, WASH. POST, Nov. 1, 2001, at D5 (describing NFL owners and NFL Players Association discussions about sharing the increased costs of providing additional security in response to September 11th); Wong, *supra* note 24 (noting that the New Jersey Sports and Exposition Authority runs Giants Stadium).

maybe the Navy can; I think it's \$330,000 for lost life—but I cannot put a price tag on a life at my stadium.³⁷

My goal is to get fans there, make sure they enjoy their experience and make sure they get home safely. If I accomplish that twenty times a year, I am 20–0.

Milt and I have worked closely together. We're fortunate. Because we are in New York, we have the NFL out there all the time. Because we are in New York, the Major League Soccer Commissioner is out there a lot. I do not consider that pressure. I consider that a good thing. I think when Milt came out he saw that we took this seriously and we did the best we could, and I think we have done a terrific job.

I agree with him; complacency is an issue.³⁸ I was recently interviewed for an article in *Street & Smith's Sports Business Journal*, and two of my compatriots in this country agreed with me that complacency and being on the tip of the spear and really watching what we are doing is important.³⁹ There was a comment from a so-called terrorist expert who says if we are focused on terrorism five years from now in the sports business, then there is something wrong.⁴⁰ I told that person, "Why don't you come and live in New Jersey and look at that skyline every day and you tell me differently."⁴¹

Nothing good came out of September 11th, and I cannot use enough adjectives that can describe that, but one by-product is that my staff will never get complacent on my watch. It will not happen. Every time they do, I just take them to one of my spirals

³⁷ All members of the uniformed services are offered insurance under Servicemembers' Group Life Insurance for the maximum amount of \$250,000. See *Servicemembers' Group Life Insurance (SGLI)*, at http://www.military.com/Resources/ResourceFileView?file=VETERANS_LIFE_INSURANCE_SGLI.HTM (last visited Mar. 16, 2003).

³⁸ See Cameron, *supra* note 20; Thomas George, *League to Increase Security at Stadiums*, N.Y. TIMES, May 12, 2002, § 8, at 6.

³⁹ See Cameron, *supra* note 20.

⁴⁰ *Id.*

⁴¹ *Id.* See also Wong, *supra* note 24.

2003]

LEGAL ISSUES IN SPORTS SECURITY

359

that face southern Manhattan⁴² and I say, “Take a look and what don’t you see anymore?”

If you read my bio, you know I went to the United States Naval Academy. I am still in the Reserves. I strongly believe in this country. I strongly believe in the people who come visit my facility. And it is not just my facility. You know, we are in the business of selling entertainment: I have an arena, I have a race track, and I want people to enjoy themselves coming to my stadium, feel safe, and then maybe buy a ticket to go to the race track or go to the arena for a hockey game or a basketball game.

Going to the safety of our guests—in the past, we did a bottle and cans check.⁴³ We would open up bags or we would have the guest open up the bag to show us what they had. We would not touch it. We would let them fumble through the bag and show us what was in there.

Since September 11th, it has been an amazing transformation. The guests want us to search them. My philosophy is that I do not know that they want us to search them as much as they want to make sure that we are searching the people on their left and right. And I am telling you we have done it, and we have not had one phone call.

A couple of issues we had where we made some mistakes were male guards searching females—and I mean searching.⁴⁴ It is not a head-to-toe, you know, get up against the wall. It is like Milt said: open your jacket, let us go through your bag. We corrected that.

The phone calls that we have received have been exactly what Milt has said, that we have not been consistent enough and we are

⁴² See generally Frank Litsky, *Jumpy Giants Welcome a Respite and the Chance to Pitch In*, N.Y. TIMES, Sept. 15, 2001, at C8 (noting the view of the lower Manhattan skyline from the Giants Stadium complex).

⁴³ *Giants Stadium Expands Security Procedures; Fans Encouraged to Enter Stadium Early*, at www.giants.com/facility/index.cfm?cont_id=76702 (Oct. 4, 2001) (“The existing policy of prohibiting bottles (glass or plastic), cans, umbrellas, video cameras/recording devices or any items deemed by management to be dangerous or inappropriate remains in effect.”).

⁴⁴ See, e.g., Rhoda Amon, *On the Go*, NEWSDAY (N.Y.), Feb. 17, 2002, at E3 (discussing female travelers’ complaints of “being ‘touched inappropriately’ by male screeners” following security increases in the wake of September 11th).

probably not searching as well as they would like us to search them.

That being said, we are going to continue. I have Major League Soccer starting next Saturday.⁴⁵ We have a place called Checkpoint Charlie—I mean, you would think we are back in Vietnam.⁴⁶ It is an area where there is a straight drive-through into the west end of the Stadium.⁴⁷ We have put up yellow Jersey Barriers, we have state police out there with their suburban vehicles and we have two bomb-sniffing dogs.⁴⁸

This past year, a New York Jet by the name of Damien Robinson unfortunately forgot that he had an assault rifle in the trunk of his car and our dog found it.⁴⁹ He was fined \$30,000 by the team—I think it was by the team.⁵⁰ He still has not gone to court yet.⁵¹ But it just goes to show you that there are no exceptions to this rule.

We do not allow anything into the gate. We allow women's purses. We allow diaper bags, but there better be a baby with that diaper bag. We do not regulate the size of the purse, although we do not want you bringing one of those big old beach bags.

It is not just that we are concerned about a suspicious item being in that bag, but if the bag is left under a water fountain, just

⁴⁵ MetroStars, *MetroStars Schedule—April 2002*, at <http://www.metrostars.com/schedule/april.htm> (last visited Mar. 16, 2003) (noting that the Metrostars 2002 opening game versus the Chicago Fire was played on April 20, 2002).

⁴⁶ See generally Michael Vega, *It's a Tight Ship at Stadium*, BOSTON GLOBE, Sept. 20, 2001, at E7 (explaining that "Checkpoint Charlie" seems to be a derivative of "Defcon Charlie," the code name for the second highest state of security alert at the United States Naval Academy).

⁴⁷ See Glauber, *supra* note 2 (noting that the Giants Stadium practice of closing some entrances off to route traffic for security purposes).

⁴⁸ See generally Wong, *supra* note 24 (discussing security measures taken at Giants Stadium).

⁴⁹ Ken Berger, *Weapons Arrest for Jet; Assault Rifle, Ammunition Found in Back of Robinson's SUV*, NEWSDAY (N.Y.), Oct. 17, 2001, at A76; Mike Freeman, *Pro Football: Inside NFL: Some Players Arming Themselves for Safety*, N.Y. TIMES, Oct. 21, 2001, § 8, at 7.

⁵⁰ Berger, *supra* note 49 ("Jets coach Herman Edwards, after consulting the NFL commissioner's office, fined Robinson \$30,000.").

⁵¹ See Jim Litke, *Leniency for NFL Troublemakers Wrong*, HAMILTON SPECTATOR (Ont.), Nov. 9, 2001, at E5 ("The case against Damien Robinson is still pending.").

inadvertently left and forgotten, in this heightened security, if somebody sees that and says, “Oh my God, an abandoned bag,” and before you know it, people are running out of the stadium, and all it is a sweatshirt and a set of binoculars, that is our biggest concern.⁵² That is a huge concern.

We have had two strange instances—not strange, but just two stupid things on people’s parts that have really shown me the attention to detail.

We had a gentleman come to the gates. He had something that we requested he return to his car. He did not want to walk all the way back to his car. He went up to a woman who was parking her car in the general vicinity and said, “Could you please put this in your car and after the game I will come and get it from your car?” She said, “Absolutely not.” He took the item, threw it under a car, and one of my security guards saw it. Within minutes, the state police were out there, the area was taped off, we have dogs⁵³—I mean, we take everything very seriously.

The next instance involved a guy who was coming to the gates with a cooler. He was informed he could not bring his cooler in. He had a thermos. He gave the thermos to his wife and said, “Here, honey, you take the bomb in.” Well, within five minutes, he was down in the state police office. We released him. We warned him. We talked to the team about the ticket holder. There is no joking. It is not a joking matter. And, as Milt said, the guests are the ones who really want us to continue to provide the security.

The biggest issue we still have is aviation. The phrase “no fly zone” came out very early on after September 11th around stadiums.⁵⁴ If you have ever flown into Newark—and I think that

⁵² See, e.g., Douglas Futch et al., *Hearsfield Security: Reaction*, ATLANTA J. & CONST., Nov. 18, 2001, at 9A (describing the panic and complete shutdown of Chicago’s O’Hare Airport after a traveler forgot his camera bag in the terminal and left without retrieving it out of fear of missing his flight).

⁵³ Bryan Burwell, *Sports Aren’t Immune to Threat of Terror That Lurks Everywhere*, ST. LOUIS POST-DISPATCH, at B1 (“Rifle-toting state troopers with bomb-sniffing dogs ring Giant Stadium for every sporting event.”).

⁵⁴ Tom Bowman et al., *Terrorism Strikes America: The Response*, BALT. SUN, Sept. 21, 2001, at 1A (“[T]he Federal Aviation Administration enacted a defensive measure at home, declaring a ‘no-fly zone’ within three miles of major professional and college sporting events.”).

everybody has—if you ever sat on the port side of the airplane and looked out the window—“port” is a Navy term for left⁵⁵—if you look out there and you look down, you see Giants Stadium. I have had people call me and tell me that aviation should ban all flights on Sundays because of the NFL. I try to explain to them that the NFL is big but the aviation industry is just a little bit bigger.

But as time has gone on, it has gotten easier and easier for us. My concern is—and we are lucky—Giants Stadium is not like some of the NFL facilities that all they do is play NFL games. I have soccer starting up, I will have some concerts this summer,⁵⁶ I will do all my emergency evacuation drills, all my fire drills, I will do my training, so on August 5th, our first preseason game between the Giants and the Houston Texans, we will be ready. It is those teams that maybe perform thirteen to fourteen events a year, that have a six-month hiatus between their last game and their next game, they are the ones I really think that have to continuously train and emphasize. And we do have that skyline to look at, so it makes it a little easier for my staff to understand why it is so important.

PROFESSOR FALLON: Thank you very much.

If I could, again, just ask one small clarificatory question: both you and Mr. Ahlerich have alluded to some complaints or concerns about consistency with respect to which practices designed to ensure security are applied. Now, I could imagine two kinds of concerns about consistency. One would be that you do not look hard enough at everybody. The other kind of concern would be that you look in some sense too hard, you single out some group of people, possibly on the basis of race, ethnicity, gender, whatever it might be. Which or both of these kinds of complaints have you had and how valid do you regard the complaints as being?

MR. AHLERICH: We have had nothing forwarded to the League Office that said that anyone was singled out. The complaints were more, “I was searched more thoroughly than I saw other people being searched.” We have received that. Then

⁵⁵ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining port as “the left-hand side of a ship or aircraft facing forward”).

⁵⁶ See *supra* notes 25–28 and accompanying text.

2003]

LEGAL ISSUES IN SPORTS SECURITY

363

we received, “I walked right in. I walked in and they did not look through my bag very well. What kind of security is that?” Those are the two types that I have seen.

MR. SQUIRES: I agree. There have not been any instances of profiling at all. It has been, “Well, I saw somebody get in with a bag and the bag was oversized,” or we had a situation early on where we did not have the appropriate female guards at the gates to search females, so we would not touch them, for sure, but we let them in without doing the search that we were doing to other male guests. Those are the inconsistencies we have had.

PROFESSOR FALLON: Now Paul Zoubek. I know one of the things I would be interested in is your reaction to what is being done by the NFL, what is being done at Giants Stadium. If these were your clients, how would you advise them? Are they doing enough, too much, or ought they to be doing something else? How do you react to what you have heard?

MR. ZOUBEK: I think what we need to focus on is the need to balance the continuing threat of terrorism with the need to get back to business. But that is one of the most difficult questions we, as a nation, have ever faced.

As an interesting segue on the last topic that was mentioned by Bill, for all of us, much like when Kennedy was shot, we will always talk about where we were on September 11th.⁵⁷ I was chairing a panel of community members and law enforcement on how to eradicate racial profiling in Atlantic City, New Jersey. With us at the time was the Chief of Police of Port Authority and the Chief of Police of Montgomery County, Virginia. We had to helicopter both of them out of the conference.

I then spent time as First Assistant Attorney General working on New Jersey’s reaction to the attack. Our immediate questions were: “What do we do now? What do we do next? What are our

⁵⁷ See generally Vivian Berger, *Every Generation Faces Its Moment of Truth*, NAT’L L. J., Sept. 24, 2001, at A26; Marie Cocco, *Respect and Sorrow*, RECORD (Bergen County, N.J.), Sept. 11, 2002 (“September 11 was not like Pearl Harbor. It was more like the day JFK was shot. . . . JFK’s death is the touchstone that people reach for, an instinctive connection made without conscious thought. It was a cataclysmic event that was incomprehensible, yet comprehended immediately as innocence lost.”).

threats? What targets do we need to harden?” As part of the immediate response, state troopers and National Guard were sent to guard the nuclear reactors, and to the vents of the Holland Tunnel.⁵⁸

At that point in time, what did we know? We knew we had just suffered the worst attack on domestic soil in our history.⁵⁹ But we did not know what was the next target, so what we had to do was undertake a total assessment of all the potential targets in New Jersey, ranking them, and deploying the available resources to meet those potential threats.⁶⁰

During that same period of time the NFL and stadium owners were conducting their threat assessments and determining what they needed to do.

Well, here we are six months later. Thankfully, we have routed the Taliban, but Osama bin Laden is at large.⁶¹ We have not had any further anthrax incidents, but we also have not caught the evildoer at fault.⁶²

I think what we have learned is that one of our greatest threats is complacency. We should not only focus on the missing World Trade Center as a symbol to remind us of the threat but we should also recognize that New Jersey and New York have been a

⁵⁸ See, e.g., Press Release, Office of Pennsylvania Governor Mark Schweiker, Governor Calls Up National Guard to Secure Nuclear Facilities Through Wednesday, Nov. 7 (Nov. 2, 2001) (announcing the deployment of the Pennsylvania National Guard to guard Pennsylvania's nuclear power plants), <http://www.pahouse.com/veon/schweikerrelease.htm>; News Release, New Jersey Department of Military & Veterans Affairs [NJDMAVA], NJDMAVA Deploys to New Jersey Conference of Mayors (May 1, 2002), <http://www.state.nj.us/military/news/archive2002/1may02njdmavadeloys.html>.

⁵⁹ See George Vecsey, *The Mayor Was There For the Yanks*, N.Y. TIMES, Nov. 6, 2001 (quoting Mayor Rudy Giuliani, identifying the September 11, 2001 attacks as “the worst attack in the history of our country”).

⁶⁰ See Bill Gertz & Rowan Scarborough, *Nation: Inside the Ring*, WASH. TIMES, Dec. 27, 2002, at A7.

⁶¹ *Pursuing bin Laden*, SALT LAKE TRIB., Jan. 11, 2002, at A16 (noting that Americans are frustrated that, despite the defeat of Al Qaeda and the Taliban, bin Laden remains at large).

⁶² *The Nation; FBI Laments Lack of Anthrax Arrests*, L.A. TIMES, Nov. 2, 2002, at A25 (“FBI Director Robert S. Mueller III expressed dissatisfaction . . . that those responsible for last year's deadly anthrax attacks had not yet been caught.”).

breeding ground for terrorists, New Jersey in particular. In the 1993 bombing some of the terrorists were from Jersey City and in the most recent attack, some had lived in Patterson.⁶³

So what do we know about our threat? I think we know that it is a real and continuing threat. And I think we have to recognize that it is a threat that challenges our very existence as a nation. What we really have to do—and one of the statements I heard from some of the heads of our Emergency Management in New Jersey I think is very apropos: “We have to establish security as a way of life.”

Last night, when my flight from Detroit was canceled, all the passengers on my flight had to go to the other end of the airport from USAir terminal to the Delta terminal. All sixty of us then had to line up to be searched. The flight was delayed two hours, I did not hear a peep from anyone. They were all thankful that that was occurring.

But how do we balance the continuing threat that we know we have against the cost of continuing some of the measures that the NFL and some of the stadiums have been involved in?

I really think what the NFL and some of the stadiums have done is absolutely what has been needed to be done, which is conduct a threat assessment, look where you can meet some of your potential vulnerabilities and establish a policy like Best Practices for your particular industry.⁶⁴

Next, you have to educate the public as to what those practices are, because the public will be cooperative. If you are doing

⁶³ Joseph Grinstein, *Jihad and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1348–49 (1996) (identifying the terrorists at fault in the 1993 World Trade Center bombing as being New Jersey residents); Aaron Brown, *The Anthrax Investigation*, CNN Transcripts, at <http://www.cnn.com/TRANSCRIPTS/0110/16/asb.00.html> (Oct. 16, 2001) (reporting that some of the suspected hijackers stayed in a Patterson, New Jersey, apartment before the attacks).

⁶⁴ See Hurst, *supra* note 7 (“In the aftermath of September 11th, most leagues, teams and venues went through a comprehensive threat assessment and established updated security guidelines and practices to meet the increased threat. The [NFL] . . . issued to teams a [Best Practices Guide] of recommended security measures before resuming play.”); Andrew Mason, *Security: NFL’s “No. 1 Priority”*, NFL News, at http://www.nfl.com/news/2001/security_092001.html (Sept. 20, 2001).

searches across the board and you are announcing them, I think that it will be accepted and appropriate.

Obviously, as someone who was very much involved in some of the New Jersey State Police racial profiling issues and the reforms in New Jersey, we cannot let this threat become a new impetus, like the War on Drugs was, for instances of racial profiling on a security threat.⁶⁵ I think the measures that have been set up, that are set up across the board at the facilities, are the appropriate way to go.

American sports is a very symbolic target of terrorism because it is so associated with the globalization of the American economy and the American culture.⁶⁶ Young kids throughout the world are wearing those jerseys, they are wearing their Nike shirts, their Nike shoes, and the terrorists are looking for a symbol to target. That is why so much effort was put in at the Olympics.⁶⁷ That is why so much effort was put in at the Super Bowl and at some of the larger events.⁶⁸ What we have to do is just establish security as a way of life.⁶⁹

I would submit that if your clients do not establish and follow the *Best Practices Guide*, they will have substantial issues as it relates to the duty of care that they owe to the participants and to the spectators.⁷⁰

⁶⁵ See Nicole Davis, *The Slippery Slope of Racial Profiling: From the War on Drugs to the War on Terrorism*, Color Lines, at *2, at http://www.arc.org/C_Lines/CLArchive/story2001_12_05.html (Dec. 2001) (reporting that eighty percent of American citizens opposed racial profiling prior to September 11th, but seventy percent of citizens now believe some form of racial profiling may be necessary).

⁶⁶ See, e.g., Roy Masters, *Super Bowl Gets Peak Rating As Terrorists Target Audience*, SYDNEY MORNING HERALD, Feb. 2, 2002 (referring to the Super Bowl as “the citadel of American commercialism” and as a potential terrorist target).

⁶⁷ Patrick O’Driscoll, *Bottom Line on \$310 M Security: Few Arrests, Games Wrap Up Safely*, USA TODAY, Feb. 25, 2002, at 4D (“The Winter Olympics bought the best security that \$310 million could buy. In the end, it worked.”).

⁶⁸ Brian Schmitz, *Security Keeps Game Safe, Sound; The Well-Coordinated Massive Effort Ranked As Unprecedented for a U.S. Sporting Event*, ORLANDO SENTINEL, Feb. 4, 2002, at C6 (noting that the “tightest security measures ever for a sporting event in the United States” were in place for Super Bowl XXXVI in the wake of the September 11th terror attacks).

⁶⁹ See Cameron, *supra* note 20.

⁷⁰ See, e.g., *Knight v. Jewett*, 834 P.2d 696, 709 (Cal. 1992) (team owner liability); *Schneider v. Am. Hockey & Ice Skating Center, Inc.* 777 A.2d 380 (N.J. Super. Ct. App.

2003]

LEGAL ISSUES IN SPORTS SECURITY

367

I think that the measures that have been put in place so far have been reasonable. I think one of the issues we have to focus on, as we look at issues with respect to facial recognition technology is potential effectiveness of the technology.

If you have a “be on the lookout” alert that a suspected member of the Al-Qaeda is nearby in a particular location, I think it would be very reasonable to engage in facial recognition or other technology to try to identify whether that individual has infiltrated a facility. A more generalized facial recognition program that does not rely on some targeting based upon realistic information may be more questionable.

So I think it is something that we have to check on. And I can tell you, as someone who has handed flags and urns to the family members of New Jersey residents who were lost, I think we all want to make sure that we have learned from this incident.

And we are making sure that this comment that you referred to from *Street & Smith's*,⁷¹ that in five years from now if we are still doing this, then people are making a mistake—I take the absolute contrary view, which is, for my children, for my grandchildren, we have to establish this as a way of life and just accept the reasonable intrusion consistent with our constitutional principles.

PROFESSOR FALLON: Thank you very much.

Norman Siegel, I am sure you have a number of things to say and a number of things in response to what has been said.

MR. SIEGEL: The horrific attack on the World Trade Center and the deaths of almost 3,000 innocent people on September 11, 2001,⁷² changed America and the world, perhaps for our lifetime. It has put our basic security into question and is now forcing us to consider issues of freedom and security, liberty, and order.

The challenge facing us—and I think I agree with Paul at least in what he said—is to find a balance, a balance that protects our

Div. 2001) (hockey rink not liable for failing to eradicate risk of spectators in bleachers getting hit by errant pucks); Hurst, *supra* note 7.

⁷¹ See Cameron, *supra* note 20.

⁷² *A Day of Terror; Bush's Remarks to the Nation on the Terrorist Attacks*, N.Y. TIMES, Sept. 12, 2001, at A4 (quoting President George W. Bush's address to the nation the evening of September 11th).

safety while preserving the principles of freedom that are such an integral part of our national spirit. I submit that we need not choose between safety and freedom.

The Declaration of Independence described life and liberty as inalienable rights.⁷³ The Constitution declares that it was established both to “provide for the common defense” and “to secure the blessings of liberty to ourselves and our posterity.”⁷⁴

In the difficult times ahead—and I think they are and will be difficult—we must continue to look to our Constitution as a beacon to guide us as we struggle to defend the principles for which it stands. These times require that we be ever vigilant, ever outspoken, and ever strong in protecting freedom.

The specific topic before us this morning is “Legal Issues in Sports Security.” This issue was fundamentally affected by the September 11th attack, but the issue had already surfaced pre-September 11th. At a minimum, legal and, if I may add, policy, issues in sports security had arisen, for example, at the 1996 Atlanta Summer Olympics,⁷⁵ as well as the 2001 Super Bowl in Tampa.⁷⁶

This morning Mr. Ahlerich informed me that some of the public information regarding the Super Bowl in Tampa is incorrect and that the facial recognition was not in the stadium but was, if I understand him correctly—if not, correct me now—in the NFL Experience⁷⁷ that was taking place adjacent to the stadium itself and in a walkway from that facility to the stadium.⁷⁸

As a minor point, I would recommend when there are public debates on these issues, if in fact the public debates are not

⁷³ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁷⁴ U.S. CONST. pmbl.

⁷⁵ Derek Jensen, *Security's Tight, Relentless*, DESERET NEWS (Salt Lake City), Feb. 17, 2002 at A1.

⁷⁶ See *Tampa Installs High-Tech Security Cameras*, USA TODAY, July 7, 2001.

⁷⁷ See *Taking in Tampa*, ABC News, at http://abcnews.go.com/sections/sports/DailyNews/superbowl_tampaguide_010118.html (Jan. 19, 2001) (“Open from January 20th to the 28th [of 2001], the NFL Experience is a 20-acre interactive football-related theme park set in tents and open areas adjacent to Raymond James Stadium.”).

⁷⁸ Jeanne Bonner, *Looking for Faces in the Super Bowl Crowd*, Security Solutions, at http://www.securitysolutions.com/ar/security_looking_faces_super (Mar. 1, 2001).

accurate, then people should jump-in and give the correct information. It is silly to have a public debate about an issue if, in fact, the facts are not accurate.

Since September 11th, the topic arose, at a minimum, in the 2001 World Series opener at Yankee Stadium,⁷⁹ the 2002 Super Bowl in New Orleans⁸⁰ and the 2002 Winter Olympics.⁸¹

The specific issue is: how do we as a democratic society committed to the principles and values of free movement, privacy, equality, and fairness provide adequate security and safety at public sporting events? The challenge for all of us is to craft and implement—implement is very important—an appropriate balance.

I also ask questions. For example, when the task force was set up, were there any civil rights or civil liberties people on that task force?⁸² Were there any people from the community? Were people from the NAACP or the Urban League⁸³ or the Puerto Rican Legal Defense Fund⁸⁴ invited to participate in these discussions?

It seems to me that, since sports is a business, business and management techniques should be inclusive so that we have the dialogue up-front, rather than the confrontations later on, on these very difficult issues. I hope the answers to my questions are in the affirmative.

Finding that appropriate balance might be difficult. It might be okay theoretically, but then implementation is “a whole other ballgame,” to use that metaphor.

⁷⁹ See Bill Griffith, *Good Memories Come to Mind Overflowing with Magic Moments*, BOSTON GLOBE, Oct. 22, 2002, at E7.

⁸⁰ Hunter S. Thompson, *For What It's Worth*, ESPN, at <http://www.espn.go.com/page2/s/thompson/020305.html> (last visited Mar. 16, 2003).

⁸¹ Brice Wallace, *Biometrics Is New Wave of Identification Technology*, DESERT NEWS (Salt Lake City), Dec. 18, 2002 (“Facial recognition technology . . . was nearly put to work during the 2002 Olympic Winter Games. . . . before the Salt Lake Organizing Committee turned thumbs down to the venture.”).

⁸² See Wilde *supra* note 3; text accompanying note 9.

⁸³ See *About Us; Mission Statement*, National Urban League, at <http://www.nul.org/about/mission.htm> (last visited Mar. 25, 2003).

⁸⁴ *About “PEARL-DEF”*, Puerto Rican Legal Defense & Education Fund, at www.prldef.org/aboutus.htm (last visited Jan. 22, 2003).

But we cannot, and should not be non-thoughtful, expedient, exclusive, or even glib, about this growing issue of public concern.

Interestingly enough, I would agree with the speakers so far that if in fact five years from now this is not a major concern, then we have been irresponsible.

As a result of a bomb exploding at the Atlanta Olympics,⁸⁵ entrance to the sporting events was contingent upon going through a metal detector and surveillance of handbags, backpacks, and bags.⁸⁶ The 2000 Tampa Super Bowl, with the addition of the NFL Experience, introduced face recognition software technology to sporting events, at least publicly.⁸⁷ Who knows if it was taking place previously? We do not know that. The software reportedly digitized the facial images of fans in an attempt to match them with “mug shots” of people in a criminal database.⁸⁸

The 2001 World Series opening game at Yankee Stadium introduced metal detectors, and I believe metal scanners, as a condition to watching a baseball game.⁸⁹ I believe the 2002 New Orleans Super Bowl and the 2002 Salt Lake City Olympics continued the practice of metal detectors and metal scanners.⁹⁰

⁸⁵ Jensen, *supra* note 75 (“[I]t was eight days into the last Olympics held on U.S. soil when a bomb exploded in Atlanta’s Centennial Park, killing one woman and injuring scores” of by-standers.).

⁸⁶ Eric Harrison & Robin Wright, *More Troops Sent to Atlanta As Bomb Threats Increase*, L.A. TIMES, July 29, 1996, at A1 (“[T]he Georgia National Guard . . . [sent] an additional infantry battalion to the Games to help handbag-searches, metal detector operators and guards.”).

⁸⁷ Robert Trigaux, *Cameras Scanned Fans for Criminals*, ST. PETERSBURG TIMES (Fla.), Jan. 31, 2001, at A1 (noting that Sunday’s Super Bowl was the first major sporting event to adopt face matching surveillance system). See also Lev Grossman, *Welcome to the Snooper Bowl; Big Brother Came to Super Sunday, Setting Off a New Debate About Privacy and Security in the Digital Age*, TIME, Feb. 12, 2001, at 72 (noting that the Tampa Bay police department (with the full cooperation of the NFL) used the FaceTrac surveillance system at the Super Bowl in Tampa).

⁸⁸ Todd R. Weiss, *ACLU Slams Facial Recognition Software*, CNN, at <http://www.cnn.com/2002/TECH/ptech/01/08/aclu.face.recognition.idg/?related> (Jan. 8, 2002).

⁸⁹ See Mike Lopresti, *From the Press Box: Stadium Security Tight in Today’s New World*, USA TODAY, Oct. 30, 2001.

⁹⁰ Mary Foster, *Long Walks Among Extra Super Bowl Security*, SALT LAKE TRIB., Jan. 29, 2002 (“Fans, vendors, media and VIPS will all be subject to thorough searches that could include X-ray machines, metal detectors and pat-downs.”). See also Jessica Reaves, *Olympic Security: Life on High Alert: Terror Doesn’t Scare the Folks in Salt Lake, Who Are Adjusting Well to Living with Hourlong Security Delays*, TIME, Feb. 12, 2002.

First and foremost are the concerns regarding facial recognition software video surveillance. To begin the analysis we must ask ourselves what security benefits the proposed technology will bring. The burden of proof is on the proponent of the specific proposed technology. She or he must demonstrate that the proposed technology will actually make us safer.

Applying this approach to the facial recognition technology, we find out that the technology, though inviting in theory, does not seem to work. In a November 2001 statement, the American Civil Liberties Union said: “Facial recognition software is easily tripped up by change in hair style or facial hair, by aging, weight gain or loss and by simple disguise.”⁹¹

In a November 20, 2001 press release the ACLU said, “A study by the Department of Defense found very high error rates even under ideal conditions where the subject is staring directly into the camera under bright lights.”⁹² The study found very high rates of both false-positives⁹³ (which was defined as wrongly matching people with photos of others) and false-negatives⁹⁴ (defined as not catching people in the database). That suggests that, if installed, these systems “would miss a high proportion of suspects included in the photo database and flag huge numbers of innocent people—thereby lessening vigilance, wasting precious manpower resources, and creating a false sense of security.”⁹⁵

Moreover, as the November 2001 statement pointed out that several government agencies “have abandoned facial recognition

⁹¹ ACLU, *ACLU Opposes Use of Face Recognition Software in Airports Due to Ineffectiveness and Privacy Concerns*, at <http://archive.aclu.org/features/fl10101a.html> (last visited Mar. 16, 2003).

⁹² Press Release, ACLU, *ACLU Calls on Fresno Airport to Remove Controversial Facial Recognition Technology*, (Nov. 20, 2001), <http://www.aclu.org/news/NewsPrint.cfm?ID=9262&c=39>.

⁹³ See DUANE BLACKBURN ET AL., *FACIAL RECOGNITION VENDOR TEST 2000: EVALUATION REPORT* (2001), http://www.dodcounterdrug.com/facialrecognition/DLs/FRVT_2000.pdf. See also P. Jonathon Phillips et al., *An Introduction to Evaluating Biometric Systems*, COMPUTER, Feb. 2000, at 56, <http://www.dodcounterdrug.com/facialrecognition/DLs/Feret7.pdf>; Jay Stanley & Barry Steinhardt, *Drawing a Blank: The Failure of Facial Recognition Technology in Tampa, Florida*, ACLU, at http://archive.aclu.org/issues/privacy/drawing_blank.pdf (Jan. 3, 2002).

⁹⁴ Stanley & Steinhardt, *supra* note 93.

⁹⁵ Press Release, *supra* note 92.

systems after finding they did not work as advertised, including the Immigration and Naturalization Service, which experimented with using the technology to identify people in cars at the Mexico-U.S. border.”⁹⁶

The ACLU concluded that “it is abundantly clear that the security benefits of such an approach would be minimal to nonexistent for a very simple reason: the technology does not work.”⁹⁷

Let me just highlight some issues, and then maybe in questions I can go into more detail.

I think there are going to be more video surveillance cameras in general.⁹⁸ I believe I read somewhere in one of the New York sports pages that Yankee Stadium is going to be putting in more video surveillance cameras. I would not be surprised if major sports venues such as Madison Square Garden, Staples Center, Giants Stadium, and the Meadowlands begin to use the video surveillance technology.

I think we need to develop guidelines. Perhaps there should be a task force including the people that I mentioned.

We do not oppose video surveillance as a general proposition or an absolute opposition. The opposition usually comes with the fact that there are no guidelines, there is very often nonexistent or inadequate signage, and there are objections when the video stays in perpetuity.

As a general proposition, if someone is using video surveillance for criminal activity, if, let us say, after seventy-two hours in observation, there is no criminal activity on the video, the video should be destroyed or erased. We do not want a permanent government, private, or government/private database of innocent

⁹⁶ ACLU, *supra* note 91. See also Stefanie Olsen & Robert Lemos, *Can Face Recognition Keep Airports Safe?*, CNet, at <http://news.com.com/2100-1023-275313.html?tag=rn> (Nov. 1, 2001).

⁹⁷ ACLU, *supra* note 91. See also Stanley & Steinhardt, *supra* note 93.

⁹⁸ See, e.g., Spencer S. Hsu, *Video Surveillance Planned on Mall*, WASH. POST, Mar. 22, 2002, at A1.

2003]

LEGAL ISSUES IN SPORTS SECURITY

373

Americans being filed somewhere in some Orwellian 1984 situation.⁹⁹

There are also questions of metal detectors. In an interesting way, Logan Airport on the morning of September 11th makes the case as strong as possible that metal detectors in some interesting way are obsolete. The terror hijackers used plastic knives. The metal detector only detects metal. So there has to be further discussion, again in the context of potential false security.

My experience on racial—and now national origin—profiling is that everybody in the universe takes the position that there is no racial profiling. Just the other day, the NYPD [the New York Police Department] said, “Never has been, isn’t, but we’re putting out a statement anyway to prohibit it.”¹⁰⁰ It is like censorship: there are no censors and nobody engages in censorship. Nobody engages in racial profiling, yet it does, has and probably will continue, because just issuing a proclamation or having the head of the organization say the right thing does not mean that it trickles down to the street corner or to the ballpark. That is where some of the focus must be.

If we are serious about this, then all of the sports teams should set up some kind of mechanism—an ombudsperson, a complaint line—so that people in the community have confidence that the people are taking the implementation of these principles in a serious way, consistent with principles of equality and fairness.

Just one last point and I will conclude. In the short term, there may be security measures implemented to address the sense of imminent threat—for example, as I have mentioned, increase of metal detectors and surveillance cameras at public sporting facilities. Where those measures and technologies reduce our basic freedoms, we should see them as temporary adjustments. We must never learn to accept them as permanent adjustments. Short-term

⁹⁹ See GEORGE ORWELL, 1984 (New Am. Library Trade 1983) (1948). In 1984, the protagonist, Winston, lives in a country run by Big Brother, a political party that conducts video and audio surveillance of its citizens and prohibits independent thought. *Id.*

¹⁰⁰ See Al Baker, *Commissioner Bans Profiling Using Race by the Police*, N.Y. TIMES, Mar. 14, 2002, at B3.

safety and security measures must not translate into permanent restrictions on our fundamental and precious freedoms.

This is not inconsistent with the statements that have been made so far that five years from now we should still be looking at this issue. But we should not in the short term buy into a society—especially at sporting events, which I think are integral to the American culture—which erodes in a permanent way basic freedoms with which we have come to identify ourselves with in the world.

Thank you.

PROFESSOR FALLON: Thank you very much.

Let me just see if I can clarify for myself—and maybe some other people have the same question—where we stand now.

If I understand Norman Siegel correctly, he is raising concerns about facial recognition technology, about the use of metal detectors, and about use of video surveillance cameras that might occur in the future, but if the NFL Best Practices Guidelines are indicative of what is currently going on, these practices are not currently being implemented, at least on a wide scale. Is that right?

MR. AHLERICH: Video surveillance cameras are very much a part of Best Practices, but not facial recognition. A very distinct difference here, because you are comparing against a database with the facial recognition technology.¹⁰¹ But the capturing of the images of patrons as they enter stadiums and during non-game days is certainly very much a part of Best Practices, with proper signage.

And I would take exception there. I certainly think we need to work hard, and it is part of Best Practices to ensure that adequate signage must be in place. Absolutely it is required that you must give notice to patrons that they are under video surveillance as they enter and that their images are being captured.

¹⁰¹ See Mark G. Milone, *Biometric Surveillance: Searching for Identity*, 57 BUS. LAW. 497, 501 (2001); *Public Places; Play Ball, but Ban the Backpacks*, NEWSWEEK, Nov. 5, 2001, at 30.

You certainly can argue the point that the expectation of privacy when you are at a public event or an event that you enter with a ticket would not require such signage,¹⁰² but we think that it is appropriate to do that, and all NFL stadiums do that, or they are urged to do it.

MR. SIEGEL: But, conceptually, it is not just privacy. I think that the expectation of privacy is very low at a public event.¹⁰³ But it is the notion of anonymity.¹⁰⁴ When I go to Central Park tomorrow, it is not that I am yearning for privacy, but I want anonymity. I do not want, unless there is a compelling government interest, for the government, and also for the private sector, to have my image and with whom I am associating.¹⁰⁵

Why does the government, or the private sector or a combination of both have to know, and have an image of, Norman Siegel going to Shea Stadium, or to any facility? You can have my image if, in fact, I am engaged in some criminal activity.¹⁰⁶ Potentially, if there is some suspicious activity, you can make a strong argument there.

But assuming none of the above, I do not think you have a right to have my image. The government does not have a right to

¹⁰² *United States v. Harris*, 402 U.S. 573 (1971) (setting forth the plain view doctrine, making it doubtful that individuals have a reasonable expectation of privacy in their appearance).

¹⁰³ Nina W. Tarr, *Clients' & Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Intent*, 5 *CLINICAL L. REV.* 271, 289 (1998) ("The concerns about privacy, autonomy and dignity are not raised by this pure observation of public events when persons have no expectation of privacy or confidentiality . . .").

¹⁰⁴ Courts have recognized a right to anonymity when related to exercising one's First Amendment right to association, but have stated that there is no general right to anonymity. See *Whalen v. Roe*, 429 U.S. 589 (1977); *Nordbrock v. Jensen*, Nos. 88-2868, 89-15171, 1990 U.S. App. LEXIS 19295 (9th Cir. filed Nov. 1, 1990).

¹⁰⁵ See *Church of Hakeem v. Alameda County*, 168 Cal. Rptr. 13 (Cal. Ct. App. 1980) (holding that the government failed to demonstrate the compelling state interest necessary to justify disclosure of the membership lists of the Church of Hakeem, stating that "the anonymity of that membership remains protected by their [First Amendment] right of associational privacy").

¹⁰⁶ *United States Dep't of Justice v. Reporters Comm. for Freedom*, 489 U.S. 749, 751 (1989) ("In 1924 Congress appropriated funds to enable the Department of Justice (Department) to establish a program to collect and preserve fingerprints and other criminal identification records.").

fingerprint—there are certain exceptions, such as employment situations—people who are law-abiding.¹⁰⁷ It seems to me those concepts have to apply in this new technology.

For example, I would like to know, when you said that the NFL is using video surveillance, and will be doing more of this, currently what happens to those images? Is there a database that the NFL has on people who come into the games?

MR. AHLERICH: The answer is no.

MR. SIEGEL: That is good to hear.

MR. ZOUBEK: If I could speak to this, I understand the issue about having a database so that we are getting into an Orwellian era in which you are tracking individuals.¹⁰⁸ But, having sat at the FBI Command Center in Newark days after September 11th, there was a need to review as many videotapes as possible to see who may have been associated with the attack. Had there been a rule requiring destruction after seventy-two hours we may have missed one of the best leads that is available to us.

So I think that is part of this balance and part of this need, because I think that may educate people more as to why keeping them longer may be appropriate. The issue is how you keep and use that information. But certainly, seventy-two hours, I think, is an arbitrary cutoff that could cut off some investigative value.

PROFESSOR FALLON: I see several people in the audience, but if I could just sharpen the question ever so slightly, I would recall that the topic for the panel is legal issues involving security, and I would put this question to Norman Siegel in the first instance:

Insofar as you are raising questions about whether somebody has a right not to have his or her image captured and to have that image retained, are you using the word “right” in the legal sense, that there is some legal prohibition against the capturing and retention of that image; or are you using the term “right” in the a

¹⁰⁷ *Id.*

¹⁰⁸ This is a reference to the accumulation of information and surveillance of individual citizens by the political party Big Brother, which controls the government in the novel 1984. ORWELL, *supra* note 99.

2003]

LEGAL ISSUES IN SPORTS SECURITY

377

policy-based, moral sense, indicating only that you would prefer that this were not done and that you think it would not be done in a better society?

MR. SIEGEL: Your question shows that you are not only a good moderator, but a good lawyer. But it also shows, without sounding arrogant, when I said in my opening, “if I may add the word policy issues,” I was being a good lawyer as well.

I think that these are frontier issues. For example, when I make the argument about anonymity, as opposed to privacy, if we were debating, Mr. Ahlerich and I, I would probably have to concede that my case for privacy argument was not so strong based on case law at this point.¹⁰⁹

But anonymity is a concept, as I explained before, that I think in due time will be used if in fact the surveillance technology is used as I think it is going to be used. And then, if we came back five years from now, I might be able to answer that question.

If you are asking me if I am prepared at this point to make the legal argument in this forum today, sure. If you are asking me if I am prepared to go before nine Supreme Court Justices and make that argument tomorrow, I probably would not take that case tomorrow. But I might take it in a year or two.

It all interacts in our judicial system, and judges are human beings too. In fact, they might be going to ballparks as well—I would hope some of them go to ballparks. In the context of that, what you do is you develop new theories, new concepts, in the court of public opinion. And, once there is a receptivity and acceptance of the concept, you are then prepared to test it in the court of law. I think in due time these issues will arise.

If you do not like seventy-two hours, buy into the concept and we can negotiate, maybe ninety-six hours.

No, more seriously, the bottom line is that when we were in the fight about crime in the streets, we would always say that if you wanted to put a checkpoint on every street corner in America with a video surveillance camera on every lamp post in America, I

¹⁰⁹ See *Whalen*, 429 U.S. at 589.

guarantee you we could drastically reduce the street crime issue, but in going that route we would not be America anymore.

It is the same point here. You could put a video surveillance camera in every section in every sports facility and you could use facial recognition, you could keep that information in perpetuity and you could have DNA samples every time someone is born in America, and you will probably have a better chance of apprehending criminals and terrorists, but then we are not America anymore.

If you are serious about the balance—and I am sure you are, but the problem is whether other people are—when you do the balance, you have to take into account the freedom principles and values, in addition to the security. When people continue, as political people do, to tell us that we have to choose one or another, or I get up and I read we have to give up fifteen percent of our freedom in order to get six percent safety, I reject that notion. It is simplistic, it is unrealistic, and it is manipulative to the American public.

MR. SQUIRES: We have a closed-circuit TV camera system at Giants Stadium. On a game day we are 80,000 people strong,¹¹⁰ we are the tenth largest city in New Jersey,¹¹¹ on approximately twelve acres. Think about that, 80,000 people on twelve acres.

Our job is to make sure that everybody enjoys themselves. Our cameras are not used to violate anybody's privacy. The people who behave themselves we do not even see. The cameras are for the people who misbehave; we capture their images, and if we have to go to court, we use that.

¹¹⁰ See, e.g., Leonard Shapiro, *Bryant, Barber Send Giants Into Postseason*, WASH. POST., Dec. 29, 2002 (estimating attendance at the December 29th game (New York Giants game against the Philadelphia Eagles) to be greater than 78,782).

¹¹¹ N.J. Dep't of Labor, *Table 6: Population for the 15 Largest Counties, Cities and Townships in New Jersey (1999–2000)*, available at http://www.wnjp.in.net/OneStopCareerCenter/LaborMarketInformation/lmi25/pl94/nj_tab_6.pdf (last visited Mar. 25, 2003) (citing 2000 New Jersey State Census data listing the ninth largest New Jersey city, Trenton, with a population of 85,403 and the tenth largest city, Camden, with a population of 79,904).

2003]

LEGAL ISSUES IN SPORTS SECURITY

379

Our tapes are re-recorded every twenty-four hours, so we do not even have the ability, if we do not have an incident then, to go back to it.

So it is used more for the protection and the enjoyment of our guests than anything else.

Now, it is funny, this facial recognition system. I just had a brief on it this past week. My question to the guys was, "How accurate is it?" They said, "About fifty percent."¹¹² I said, "Well, that is certainly not good enough."

You know, we have to remember—and I think Paul put it best when he said that—you know, I said before, our security should be like a good boxing referee. We are there to help. We want you to enjoy the event. When we start providing so much security that people cannot enjoy the event, they are not going to go anymore. So you have to temper safety with everything else.

Thank you.

MR. SIEGEL: Could you use the word "freedom?"

MR. SQUIRES: Listen, I spent twenty-six years of my life defending the freedom of this country, so I do not even want to get into that debate.

QUESTIONER: Is there not a legal difference between your right to anonymity walking down the street or walking into Central Park versus going to a stadium where you already have to pay a price to get in, and in some cases many people cannot afford the price to get in? It seems to me they are two different situations.

MR. SIEGEL: I still think there is anonymity in a sports facility. Why should anybody know where you go and with whom? You could have all kinds of scenarios where you do not want anyone to know who you are going with, from political to social associations.

Hearing what Bill Squires said and how Giants Stadium uses their surveillance is encouraging. He is saying that within twenty-four hours it automatically erases it. They will know during the

¹¹² See Mike Bone et al., *Evaluating Facial Recognition Technology for Drug Control Applications*, ONDCP International Counterdrug Technology Symposium, June 26–28, 2001, at 8, <http://www.frvt.org/DLS/ONDCP2001.pdf>.

course of that afternoon whether there were any criminal activities taking place there, as a general proposition. There could be some instances where in fact you will not know until later on, so that is why I suggested seventy-two hours.

But the balance is you are going to lose some of that, in the sense that if we agreed on a week, for example, where someone did not make a complaint until two weeks later, but that probably will be aberrational, not general. In that context, you weigh losing that identification evidence with the fact that you do not have the database possibilities, which is antithetical to a democratic society as a general proposition.

But to your question, if I am in Shea Stadium and am law-abiding, I am not sure that people have a right to know that I am there.

MR. ZOUBEK: It would depend on the ownership of that particular facility. Is it a public facility? Is it a privately owned facility?

There are the rights of a private property owner.¹¹³ If I wanted to put a camera in every corner of my home, I certainly could do so, and it would certainly be my right to do so.¹¹⁴ In the balance of working with spectators, if you identify that is what you are doing, that you are coming into our home, you may enjoy yourself because we provide entertainment for you while you are in our home, but these are our rules while you are in our home. The owner's control is stronger to the extent to which it is a private facility.¹¹⁵

MR. SIEGEL: Right. But that could change, too, if the state legislature or Congress decided to legislate and to regulate video surveillance cameras.

It is interesting. Video surveillance cameras, in general, are popping up all over America. In December 1998, I did a study just

¹¹³ *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) ("Business premises invite lesser privacy expectations.").

¹¹⁴ *Id.* See also *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 184 (1st Cir. 1997) (dismissing invasion of privacy claim arising from employers surveillance of employees in work areas).

¹¹⁵ See *G.M. Leasing Corp.*, 429 U.S. at 353.

in Manhattan, and there were 2,400 video surveillance cameras.¹¹⁶ It was not Orwellian because eighty-nine percent of them were privately owned.¹¹⁷ But all of those cameras—that is almost three and a half years ago—were in place without a single public hearing, without a single public debate with regard to the pros and cons of video surveillance technology.

You could develop a piece of legislation that would alter what you just said. And I think that the proponents of video surveillance cameras, including the ballparks, have to come to understand that as they move in this direction, if they do it in an insensitive way and not a balanced manner, I would predict that that legislation will become more of a possibility.

QUESTIONER: Regarding the facial recognition system, Bill, I do not know which one you looked at, because there are many of them out there and they work on different principles.

The one that I am familiar with that works the best actually takes a video and converts it to an algorithm of the face.¹¹⁸ Once that is done, the video itself is discarded as useless.¹¹⁹ So when you go panning through a crowd, what it does is match the database against another algorithm to form that match. So you are really not looking at faces, you are looking at a mathematical formula, which provides a lot more protection. And it does have intelligence built into it so that, with weight gains and facial hair and the like, it does actually learn and adjust those records.¹²⁰ So somebody who is not in a system that you are comparing it to, you would have no idea who these people are in any case. You can use

¹¹⁶ See Norman Siegel, *Beware of Video Surveillance Cameras*, New York Civil Liberties Union, at <http://www.nyclu.org/siegel/siegel7.html> (last visited Mar. 16, 2003); *NYCLU Surveillance Camera Project*, <http://www.nyclu.org/surveillance.html> (last visited Mar. 16, 2003). Maps identifying camera locations in Manhattan can be found at <http://www.mediaeater.com/cameras/maps/nyc.pdf> (last visited Mar. 16, 2003).

¹¹⁷ ORWELL, *supra* note 99 (In 1984, all surveillance was conducted by the government in an attempt to control citizens' thoughts and actions.)

¹¹⁸ See, e.g., Dep't of Defense Counterdrug Technology Development Program Office, *FERET: Overview*, at <http://www.dodcounterdrug.com/facialrecognition/Feret/feret.htm> (last visited Jan. 20, 2003).

¹¹⁹ *Id.*

¹²⁰ See RAND, *Super Bowl Surveillance: Big Brother or Beneficial Technology?*, at http://www.rand.org/natsec_area/products/ip_biometrics.html (last visited Mar. 16, 2003).

the video after the fact to send it in to then have it scanned through a system. But it really does provide a lot of privacy as long as you are not in anyone's system.

MR. SIEGEL: When you say "system," do you mean criminal database?

QUESTIONER: Yes.

MR. SIEGEL: Just—and maybe you can comment also—the other part when I talk about implementation, whatever did happen at the Super Bowl, the database was incredibly narrow. The idea was looking for terrorists—it turned out what they were looking for was pickpockets or ticket scalpers.¹²¹

QUESTIONER: Right. It goes back to garbage-in/garbage-out. It has to be matched up to the appropriate source.

MR. SIEGEL: Well, but, more importantly, it is connected to false security. What I am saying is that some of this is inviting theory, but what is in place does not match the theory. Therefore, the American public could be misled into thinking that this new technology is making you safer when in fact it is not doing that. If we are going to be serious and realistic about this, which I think we are all committed to, we should not be setting technology in motion that gives a false sense of security.

MR. AHLERICH: That is mostly correct in terms of what was in the database in Tampa, but also the image of Eric Robert Rudolph, who had been charged with the bombing in Atlanta, and his associates were in the database also, which we thought was completely relevant to protecting the event.

¹²¹ See, e.g., ACLU, *Q&A on Facial Recognition Technology*, ACLU Archives, at http://archive.aclu.org/issues/privacy/facial_recognition_faqs.html (last visited Mar. 16, 2003).

A second use of the [facial recognition] technology was at the 2001 Super Bowl in Tampa, where pictures were taken of every attendee as they entered the stadium through the turnstiles and compared against a database of some undisclosed kind. The authorities would not say who was in that database, but the software did flag [nineteen] individuals. The police indicated that some of those were false alarms, and no one flagged by the system was anything more than a petty criminal such as a ticket scalper.

Id.

2003]

LEGAL ISSUES IN SPORTS SECURITY

383

QUESTIONER: Just one more, commenting on the ticketing issue. In most cases in sporting events now, there is a very small percentage that actually pays cash for a ticket in advance or at the gate. So in almost every instance when you do have a problem at a sporting event, you can trace back the origin of who purchased the ticket in any case. So it is a very, very tiny number of people who are anonymous.

MR. SQUIRES: Just to address the facial recognition, we did not solicit the presentation, the presentation came to us. But the technology that they use is measuring the pixels between the two eyes. They have shown where—this presentation was impressive, but, like I said, fifty percent accurate is not going to happen for us.

PROFESSOR FALLON: In some ways, in comparison with what I would have expected coming in, the conversation here has been remarkably sanguine. What I mean by “remarkably sanguine” is this: everybody agrees that we have to have a balance between protection of security on the one hand and protection of liberties and anonymity and so forth on the other hand. Everybody seems to agree that what is for the most part being done now seems to be sensible and adequate with respect to protecting security. I do not hear anybody here on the panel advocating that dramatic new steps be taken.

Norman Siegel objects to some use of video surveillance cameras, but his principal objections, apart from that, have been levied at things that might be done in the future but that have not been done yet.

And so, as I say, I get some sense everybody up here is relatively content with the way that the world is today.

So here is my question: As somebody who goes to sporting events and is concerned about my security when I go there, how sanguine ought I to feel? How great is the threat to me when I go to a sporting event, or to somebody who goes to a sporting event at Giants Stadium, and what else might be done to deal with that threat? Indeed, what likely would be done if, God forbid, there were a successful terrorist attack on a sports facility somewhere in the country? What would happen next?

MR. SIEGEL: Before anyone answers, I just want to comment. I am not as sanguine as you think I am. It is early Friday morning.

I do not know enough about what is actually taking place. As a civil libertarian, I believe in fairness. I will not make accusations unless I have evidence. What I have done here this morning is lay out my conceptual objections and concerns to certain technology.

For example, I came in prepared to be critical of the 2001 Tampa Super Bowl, and then Mr. Ahlerich told me outside certain things that I had not known before.

I am laying the groundwork. If in fact—and it is very possible that history proves this—we find out after the fact that some of these things are currently taking place, you will hear me yelling and screaming. But at this point I do not have that information.

Everyone here has said, for example, on racial profiling they are against it. Well, that is good to hear. But I also made the comment that everybody says that. And if, in fact, it is taking place, or did take place, there could be some challenges to that. We do not have that evidence at this moment. I just wanted to qualify that for the record.

PROFESSOR FALLON: Right. Okay.

So to other members of the panel as well, how safe are we today? What could be done to make us safer? What would be done next to make us safer if we had some reason to think that the threat was greater than we apparently take it to be today?

MR. ZOUBEK: I think one of the issues that we have had, both in government and in terms of the operation of facilities, is: What is the threat and how does it get communicated?

One of the greatest difficulties is that we know that there is a generalized threat, but we do not have any specific information as to where a strike might occur. So what we are engaged in is a generalized target hardening, identifying where the vulnerabilities might be, and trying to make it as safe as possible for people to decide that they will continue to go to sporting events.

As I was going back and preparing for these remarks, I saw a very chilling *Security Management* article from 2000 that had focused on whether all other tall office towers were doing the same

2003]

LEGAL ISSUES IN SPORTS SECURITY

385

“great job” with security that the World Trade Center was as a result of its \$60 million ‘Gold Trophy’ security efforts in the wake of the 1993 World Trade Center attack?”¹²²

The first thing I heard on September 11th was “a plane has gone into the World Trade Center.” I heard that from the Chief of the Port Authority Police. I thought it was a small plane. That specific threat was not in my realm of thinking, or many people’s realm of thinking.

Because we do not know what may happen next, we do not know where it may happen next, what we do is identify vulnerabilities and attempt to try take reasonable security efforts. We cannot make guarantees as to what is going to happen next, that is a very difficult thing. I think we have done everything that we reasonably can to identify the vulnerabilities, but I think we constantly have to be gathering intelligence. And sporting facilities—I am sure Milton, with his background—a lot of facilities have hooked up with the local law enforcement authorities, with the increased intelligence efforts that we have to engage in, so we know a little bit more about the threats.

The problem is we are really in a stage right now where we have a generalized threat that we are not fully able to evaluate.

MR. SQUIRES: I think if we were to do any more at Giants Stadium it would disrupt the enjoyment.

The only other thing I could think that we are not doing is checking every car that comes through the toll plazas. I think if you have ever been out there—27,500 cars, 32,000 on a Monday night—that is virtually impossible for us to do and it would disrupt the enjoyment of the game.

So we feel pretty comfortable that we are going to take probably all steps—I do not think we could take any more, to be honest with you.

¹²² Michael A. Gips, *Building in Terrorism’s Shadow*, Security Management Online, <http://www.securitymanagement.com/library/000852.html> (May 2000) (“In the last seven years, the World Trade Center spent \$60 million in capital funds to counter this [terrorist] threat, setting the gold standard for trophy building security.”).

MR. AHLERICH: For our events we used a sliding scale, with the idea that the games in the post-season, the ten post-season games including Super Bowl, were higher risk, higher threat, again to generalize. We received very few specific threats that were vetted through law enforcement that had a terrorist sense to them during the year—two or three that proved to be not valid, which we worked very, very hard in advance of games.

The amount of security went up for our post-season games, with additional measures being taken in each one of the stadiums, security reviews and additional measures being taken, with the culmination being the Super Bowl, where we went to the next step, to a complete hardened perimeter all the way around the Super Dome and magnetometers and pat-down searches,¹²³ which are done at a few stadiums but not very many. Again, these were consent searches across the board, with full signage and full notification to all fans. We had complete cooperation from our fans at Super Bowl.

QUESTIONER: As a lawyer/sports-fan/civil libertarian, I want to give you an observation, an anecdote, and a hypothetical.

The observation is that at Shea Stadium we are right in the flight path.¹²⁴ On a Saturday afternoon, there have to be eight-to-ten planes that fly directly over Shea Stadium. We are all expecting one of these days for one of those planes to just fall into Shea Stadium. Why that has not been made into a constant no-flight zone is beyond me.

The anecdote is, as a New Yorker and a sports fan, I know that I can sit anywhere I want in Shea Stadium. You just talk to the guards and you make your private arrangements.

I went in there one day and all my friends were gone. I went over to one of the people that I knew and said, “Where is So-and-So or So-and-So?”

“They have all been fired.”

¹²³ Mary Foster, *Super Bowl Security No Leisurely Stroll for NFL*, at <http://www.globalsecurity.org/org/news/2002/020128-attack01.htm> (Jan. 28, 2002).

¹²⁴ *Shea Stadium*, at <http://www.ballparks.com/baseball/national/sheast.htm> (last visited Mar. 16, 2003) (“Shea Stadium is the noisiest outdoor ballpark in the majors because it is in the flight path of La Guardia Airport.”).

2003]

LEGAL ISSUES IN SPORTS SECURITY

387

I said, "What happened?"

He said, "They were all taking bribes and they were caught on videotape,"—and they were—and they were all fired with no appeal. They are all back, by the way.

[Laughter.]

MR. SIEGEL: They did not need an appeal, then.

QUESTIONER: The hypothetical is: I am accustomed to being searched, I am accustomed to taking my belt off, I am accustomed to taking my shoes off, to going through metal detectors, because President Clinton has been there or John Rocker has been there, we have had surveillance in that stadium up the wazoo. But what would happen if I walked through the gate and some facial recognition system said, "Stop him, he's the one." How do I rebut that? How do I get into the game? And let's say that it is a World Series game and I have paid \$1,000 for a ticket. What happens then? And what happens if I cannot get into the game and the stadium is wrong?

MR. SIEGEL: Well, you would have a cause of action.

But putting that aside, I think that is exactly the point. It is one of the reasons why, knowing what I know about facial recognition software technology, I would strongly recommend that it not be employed at this point.

I would leave the door open if the technology changed. But as of this point, with this season coming up for baseball, for example, at Shea, they would be making a huge mistake to go in that direction and use that facial recognition. And there is a good chance, a little more than forty percent, that your hypothetical would actually happen.

MR. AHLERICH: I sit on a committee with the International Association of Assembly Managers for Security that is developing a set of Best Practices for a much larger scope in terms of venues, and nowhere is facial recognition technology being seriously considered, that I know of, certainly not by this task force, this committee.¹²⁵ I mean, we are talking about it a lot, I think it is

¹²⁵ The International Association of Assembly Managers [IAAM] is an organization designed to provide leadership and education for those who manage and serve public

good that we talk about it a lot, but it is not being used, and for the exact reasons that we have discussed here. The technology is premature and there are some privacy issues.

But let's not throw it out. As you say, keep it open; let's keep it open. But let's debate it, as we are, which I think is appropriate.

It is not being used, and I do not think it is going to be used right away, from what I hear from the professionals.

MR. SQUIRES: I would hope that if you are paying \$1,000 for a ticket that the Yankees are playing the Mets in the World Series.

MR. SIEGEL: If it did happen, I will give you my cell phone number, because I will be at Shea this October, and I will come out and get you in.

MR. ZOUBEK: It is going to depend on the circumstances of whether or not it is part of the generalized security enhancement that the stadium is engaged in and you will have to balance competing interests at the time—privacy versus security. Where there is a specific threat to a facility, then the public, the fans, everyone is going to have the expectation that we are doing more, and then you are going to have to evaluate the competing interests of privacy versus security.

I agree with Bill that if the devices you are seeing are only fifty percent accurate, then you are not into a zone where you are even considering using it. But if there was a compelling need at that time, in terms of the security threat, that would give the facility, I think, a different base of argument, depending upon the technology at the time.

MR. SIEGEL: Opening day for Yankee Stadium, because President Bush was there, there was a different kind of security

assembly facilities. See <http://www.iaam.org> (n.d.). The IAAM's Safety and Security Task Force was established to review and recommend security guidelines for venue manager. See Press Release, IAAM, IAAM Safety and Security Task Force, Record Numbers Attend International Association of Assembly Managers' Conference on Patron Safety and Security Preparedness at Public Venues (Nov. 21, 2001), http://www.iaam.org/Industry_News/icmc.htm.

2003]

LEGAL ISSUES IN SPORTS SECURITY

389

system than the remaining games.¹²⁶ But it then raised the issue of: Is that going to happen at every game? Even if they are playing the Kansas City Royals and nobody is there, will that technology be used?

These are issues that we have to keep our eyes on, and I think we have to raise our civil libertarian concerns and objections so that the folks here are not making decisions in a vacuum.

You would be surprised—and I hope it does not come out too corny—that the objections, if they are presented in a reasonable fashion, sometimes the decision makers actually listen and they hold back.

But I would hope that when you are doing these task forces you put civil rights people on those panels so that you do not have the divisiveness that these issues could create. Have them in the room, and then make a conscious decision, as opposed to making the decision afterwards. And I think, unless you tell me otherwise, very often they do not do that, and I think it is a mistake.

QUESTIONER: Well, since we are back at law school, I feel I want to ask this hypothetical to the panel. Let us assume it is five or six years into the future. Facial recognition technology is now ninety-eight percent accurate. It is linked with local criminal databases, the FBI database, potentially working with Immigration and the DMVs around the country, in order to get a very sure match on your face. Also buffer that against the fact that September 11th has taken place and along the way during these five years we have defeated potential terrorist threats in the United States where they have been caught before they were able to accomplish their mission.

I would like to open it up to the panel to see what they think about using this technology that now has been more perfected in the future at sporting events, which are probably one of the best targets for these terrorists.

¹²⁶ *Strike One: President Bush Throws Out Ceremonial First Pitch*, CNN/Sports Illustrated, at http://sportsillustrated.cnn.com/baseball/mlb/2001/worldseries/news/2001/10/30/bush_ap (Oct. 30, 2001).

MR. SIEGEL: Would you add into the hypothetical that if in fact the digitized facial—whatever the technical word is—the picture of the person, that if you are not in the database, it is immediately destroyed?

QUESTIONER: I would say that most people are in the DMV. I am saying that every time you take a picture with the government, you are recorded somewhere, obviously, and that you can use that database through a broadband access to immediately get a match on that person.

MR. SQUIRES: I think the database that we are looking at is not the 275 million people across the United States. It is more of those who may have some sort of a record or may be more of a threat to the stadium.¹²⁷

Now, I do not think we would ever look at jaywalkers, but maybe scalpers certainly, maybe people who we have ejected from the facility who cannot return without permission, those kind of things.

But I would have to say this: I mean, who would have thought twenty years ago that we would be implementing the security procedures we have now? I think we need to stay in touch with what is going on and at least evaluate it and look at it.

MR. SIEGEL: I would be opposed to that in the way you described it. It is just overly broad; it dragnets in a large, large percentage of innocent people. I would be opposed to that.

The harder question is if you created a criminal database with a much more narrow scope and if you were able to have the technology so that if Siegel walked through, and assuming in six years I am still the law-abiding person I am now, that they do not have that kind of capacity to keep my photo. That is a harder hypothetical.

But the way you framed it, I am opposed to that.

QUESTIONER: Well, I am just saying the reason it is linked with these databases is that terrorists—and I have been following the case very diligently for my own reasons—all these people were

¹²⁷ See John D. Woodward, Jr., *Super Bowl 2001—The Game Was the Least Interesting Part*, WASH. POST, Feb. 4, 2001, at B4.

2003]

LEGAL ISSUES IN SPORTS SECURITY

391

able to get into the country, develop an identification through their local DMVs, and go around as people, and no one suspected them. They were the most law-abiding people that you could see. They were the people who lived next door. Terrorists do not wear big signs on their heads saying “I am a terrorist” and they do not try to commit acts of criminality until the very end.

MR. SIEGEL: You get a picture and you then know that somebody has a driver’s license. So what does that tell you?

QUESTIONER: All I am saying is that the reason I framed the hypothetical that way is because of these people—to make the database wider to try to catch them and to try to keep them recorded.

MR. AHLERICH: But they would have to be wanted. They would have to be identified as a terrorist. The people who were here were not wanted. They were here illegally, but they were not tagged, if you will.¹²⁸ So even if you would have captured their images, they would not have been stopped.

MR. SIEGEL: All drivers are not terrorists.

MR. ZOUBEK: Let me ask, to follow back on, Professor, your comment in terms of the legal issue here: What if I have a stadium owner who says, “You know, I love my fans so much, I would really just like to have a picture of all of the sections from each of the games and I want to have a photo album over here of all my happy fans over the years?”

MR. SIEGEL: Get consent. That is not hard.

MR. ZOUBEK: What has he violated? What has he done that is illegal? What has he done that you can sue him for under current law that he has violated?

¹²⁸ See, e.g., Karen Alexander, *Airport to Get Facial Recognition Technology*, L.A. TIMES, Oct. 29, 2001, § 2, at 1.

The way the new [facial recognition] technology is going to be deployed . . . would have been useless in stopping Mohamed Atta, the suspected ringleader of the Sept. 11 terrorist hijackings. Unless he had been arrested, he would not have been scanned. And since Atta is not believed to have had a criminal record . . . his face would not have produced a match.

Id.

It is no different than advising a client in any other line of business as it relates to the duty of care of their participants and their spectators.

One of the notions that I think is important to keep in mind is that to the extent to which there are Best Practices developed in your industry, if your client is not abiding by those Best Practices, that will be Exhibit 1 in any litigation.

So your client must remain current as much as possible with security developments in their line of the sports business, whether it related to obligations to individual player clients, whether it is obligations for stadiums operators or event organizers. I do not think the analysis is really going to be much different than in many other fields of law.

But there are other issues for sports lawyers, such as union relations when criminal background checks are done for security purposes.¹²⁹ Also, how prepared are your employees to respond to an incident. As first responders, what protection have you provided for them should something happen in the facility? Those are some of the issues affecting the day-to-day operation of a facility or a sporting business.

PROFESSOR FALLON: In terms of suits under current law, I want to ask a question that maybe cuts a little bit the other way from the thread of the discussion as it has developed so far.

We have here an enormously effective lawyer advocate in Norman Siegel, who has focused the conversation to a very considerable extent on the kinds of issues that a civil liberties lawyer would raise in response to increased surveillance and other efforts to protect security. But not all effective lawyers are civil liberties lawyers. There are a lot of very effective lawyers who are plaintiffs' tort lawyers. If there were some kind of a disaster at a facility, you can be sure that those plaintiffs' tort lawyers would be eager to jump into the fray, filing lawsuits claiming that what had

¹²⁹ To institute a policy of criminal background checks on employees represented by a union and covered by a collective bargaining agreement, an employer will have an obligation to bargain with the union. See 29 U.S.C. § 158(a)(5) (2000).

2003]

LEGAL ISSUES IN SPORTS SECURITY

393

been done to protect security would not satisfy the duty of reasonable care that any facility owner or manager bears.¹³⁰

So is that not relevant to the question about what facilities would have to do with developing technologies, the duty of reasonable care? Would we not have to worry about that as well?

And then, as a related question, I am curious, for those of you actually in the business of making decisions and counseling clients, to what extent are you talking to them about legal issues, possible legal liability, and duties of reasonable care, going beyond what would be the sensible thing to do from a business perspective anyway?

MR. SIEGEL: Your question is a good one.

There is a flip concern that I have. That is, for example, in private buildings you see more and more surveillance cameras. I had a conversation once with an attorney who represented a co-op, and he argued, "Well, there is no crime in the building, but it has become the standard now that you have to have them." Once you go down that slippery slope, you are going to have all these kinds of surveillance cameras in private buildings. And why are they there? Well, because the Jones's had it, and therefore that becomes the standard.

And generally in advising clients, lawyers want to give them all their deliberative thoughts and say, "It would be better for you to do this." And then, lo and behold, in a short period of time, every building has a video surveillance network. So that is what we could be going into.

MR. AHLERICH: I just want to comment briefly on the thinking that we had as we developed the *Best Practices*.

One of our attorneys in the initial stage of the discussion said, "You are creating a very, very dangerous set of documents." That argument ultimately did not win out. Ultimately the argument that we had the responsibility to provide care and some sort of even-handed protection to our fans to the best of our ability and urge the stadium to do that was our larger responsibility and the right thing

¹³⁰ See *supra* note 70 and accompanying text.

to do. But it was debated rigorously among our attorneys and those of us in the process of protecting our fans.

MR. SQUIRES: That being said, Milt, those Best Practices, when they were given to the teams and to the facility managers, there was nothing that said, "You must do this, you must do that." Everything was recommended, and all the recommendations were pretty darn good.

PROFESSOR FALLON: Let me just pick up, for example, on the issue of metal detectors in *Best Practices*. If you use metal detectors for some events—the Super Bowl, or use metal detectors if the President is coming to Yankee Stadium—then presumably you could use metal detectors for all events. If you are not using metal detectors for all events when you use them for some events, are you living up to a standard of reasonable care?

MR. AHLERICH: We think ultimately it is up to the facility whether they use it or not, or those in charge of the event. And the use of metal detectors has to be reasonably balanced on the threat that you have. At Super Bowl, we believed that the threat was very high.¹³¹ We believed that, as the icon of sporting events, that it necessarily provided a very attractive target to terrorists.¹³²

I heard a comment earlier about the use of metal detectors and how effective were they, whether or not they were a good idea. I would suggest that they do a lot of good. And we know they do a lot of good, because where you use them you find guns and knives in the bushes outside of the locations where they have been employed.

We are not making it an absolute standard across the board. They are being used in some stadiums, very few. They are being used randomly in more stadiums. And I think we will certainly continue to use them at our premier events.

MR. SQUIRES: If I could add real quickly, in twenty-six years at Giants Stadium, we have used metal detectors twice, both by direction. We did not volunteer to do it.

¹³¹ Mark Lepage, *Football? What Football?: Tomorrow, Many Millions of People Will Watch U2, Paul McCartney, Britney Spears—Oh, Yeah, and the Super Bowl Game*, GAZETTE (Montreal), Feb. 2, 2002.

¹³² *Id.*

2003]

LEGAL ISSUES IN SPORTS SECURITY

395

October 1995, when Pope John Paul II came, the Secret Service said, "You will use metal detectors." We had to open up the gates five hours prior to the Mass because it took that long to get people in. That was understandable.

The second time we had to use them was last summer for 'NSync. That is not understandable, not even for a second.

I have a challenge with metal detectors. I understand what Milt is saying. Because of what we are doing at the gates, checking people, after games I have my ushers go through all the aisles. For those of you who attend Giants games, do not give this secret out, but I actually go and look for cans. Where I find empty cans, I put an undercover individual in that section next week to see if you are smuggling cans. And then we take the appropriate action.

We do not find cans anymore. And it is not because we are doing such a good job at the checkpoint. It is because people know we are searching.

The same thing—we found knives and we found all kinds of things outside the gates in the trash cans. It has been pretty incredible. And as the season wore on, as people got used to it, we found less and less outside the gates.

But the metal detectors—you know, I found in 1995 when the Pope came that the metal detectors are somewhat sensitive or insensitive. It rained. It affected the measurements and whether they worked or not. But the most important thing is you've got a different staff coming and working—well, you try to keep consistent with your staff, but to train them in how to use them properly.

At 'NSync—and I did not object to it at all—they were magging¹³³ the front of the people but not the back of the people, and I said to my people, "Well, you know, there are two sides to a person." If you are going to bring something in, you get it in one way or the other.

¹³³ Security personnel use the term "magging" to refer to the process of using hand-held metal detectors.

So I am not sold on the metal detectors yet, and I think it will be a while—I mean a long while—before you see them in our place.

MR. SIEGEL: I do not know the answer to the following question, but I will raise it. Again, in view of what we do know what happened at Logan Airport on September 11th, if you had an event that you really wanted to be absolutely sure that there was going to be no terrorist attack, I am not sure the reasonable thing to do is to just rely on a metal detector.¹³⁴ There is actual technology—the X-ray concept that I think customs has; some places have it, I have heard—but it is very expensive, and as a result it is not being used.¹³⁵

But if you had hypothetically a threat, which does not exist here today, that there would be a terrorist who would be so upset by what the other gentlemen are saying here today that they would want to come and engage in some terrorism and take everyone out, if you put a metal detector up at this door, the terrorists know, as we know from September 11th, that they do not need to bring any metal.¹³⁶ So they bring a plastic device in here.

So if you were really concerned about protecting everybody and you were going to put a metal detector out there, should you not then elevate the technology for X-ray equipment that would detect stuff like plastic explosives?

¹³⁴ Two of the four planes involved in the September 11th attacks departed from Boston's Logan Airport. It is believed that the terrorists utilized box cutters and plastic knives to hijack the planes, weapons which got past the metal detector security checks at the airport terminal. Following the attacks, airports have begun to supplement metal detectors with additional security measures. See *infra* note 136 and accompanying text. See, e.g., Jeff Jacobs, *City Finds New Perspective*, HARTFORD COURANT (Conn.), Sept. 19, 2001, at C1.

¹³⁵ See Sara Kehaulaiani Goo, *Large, Small Airports to Use Different Security Systems*, WASH. POST, Mar. 28, 2002, at A5; *A New Line at the Airport*, HARTFORD COURANT (Conn.), Jan. 2, 2003, at A8; *Port Officials: We Need More Money for Security*, News Max, at <http://www.newsmax.com/archives/articles/2002/1/29/104432.shtml> (Jan. 29, 2002).

¹³⁶ Peter Mansbridge, *Attack on America*, National Transcripts, at <http://www.tv.cbc.ca/national/trans/T010912.html> (Sept. 12, 2001) ("Each plane has three to six hijackers on board armed with box cutters and plastic knives.").

2003]

LEGAL ISSUES IN SPORTS SECURITY

397

I know most people are shocked when I raise that because the stereotype of the civil liberties lawyer is that we do not want anything. But that is not true.

MR. AHLERICH: That is why we also employed the pat-down, because we were concerned about individuals bringing in large amounts of C4 plastic strapped to their bodies. It has not been done in this country, but certainly that has been used elsewhere.¹³⁷

MR. SIEGEL: The pat-down is more clearly non-individualized suspicion and more intrusive than walking through a door that has some X-ray capacity that a light goes on and then you have the individualized suspicion. The courts have not recognized this, unfortunately from my perspective, from airport searches, from searches in courthouses. I have been involved in some litigation on that going back thirty years.

And also, quite frankly, as the panelists have pointed out, the public is not receptive to these "lawyer arguments." And so, as a result, those transgressions continue and grow.

MR. ZOUBEK: I met days after September 11th with the Association of Criminal Defense Lawyers in New Jersey¹³⁸ to discuss the response to September 11th and one of the first questions I got was: "What are you doing to keep us safe?" We then engaged in a discussion of recent detentions and the difficult issues concerning tracking Al-Qaeda after the attacks. We discussed that some of those decisions on who was associated with Al-Qaeda may end in court.

¹³⁷ See *Terrorism: Mechanics of a Living Bomb*, War Online, at <http://www.waronline.org/en/terror/suicide.htm> (last visited Mar. 16, 2003).

¹³⁸ See Ass'n of Criminal Def. Lawyers of N.J., *Welcome*, at <http://www.acdlnj.org> (last visited Mar. 25, 2003).

The Association was established in 1985 . . . to respond to the continuing problems confronting criminal defense lawyers when they honestly, ethically, but zealously represent their clients; to protect and insure compliance with those individual rights guaranteed by the New Jersey and United States Constitutions; and to encourage cooperation among criminal defense lawyers engaged in the furtherance of those objectives.

Id.

But certainly, those who are responsible for security are going to take those measures that protect the public. Some of the measures may be subject to negotiation such as seventy-two hours versus a week on the tapes but some decisions will have to be made quickly based upon a compelling need. I hope we have the courage to make those difficult decisions, and some of those decisions will be challenged and litigated.

PROFESSOR FALLON: Let me play the cynic here just for a minute.

When I hear the discussion about metal detectors, I hear Norman Siegel raise civil liberties objections, but, frankly, it is not one that resonates terribly much with me. It does not seem to me to be a big deal to walk through a metal detector. There are lots of places where I have to do it in going about my life today.

I said the question I was going to raise was a somewhat cynical question. The discussion so far has been proceeding on the assumption that what we are trying to do is engage in some refined balance between security, on the one hand, and civil liberties, on the other. Cynically, am I wrong to think that a big reason that we do not have metal detectors is just, from the perspective of the industry, it is too expensive?

MR. SIEGEL: I think that is right.

MR. ZOUBEK: Too expensive and impractical under certain circumstances, because if you have 40,000 people going into a stadium, in terms of backing them all up in long lines, it is a question of the current technology balanced against the risk.

MR. AHLERICH: It is very difficult to have everyone trained and to have—these are expensive devices. The better ones are very expensive. And it is not a perfect technology.

MR. SIEGEL: But the point that you were making, Professor Fallon, and I want to focus in on it and magnify it, is privacy is based on the expectation of privacy. So by your own words, you have now become accustomed—I think that was the word that you used—to go into public facilities and to go through a metal detector, whether it is the courtroom, or whether it is the airport. That is a concern that civil libertarians have, that it is almost, by definition, the more it is used, the more people become accustomed

to it, the right diminishes to the point that it does not exist anymore.

The Fourth Amendment—I could make a strong argument that that is what has happened in the last twenty years. There has been an erosion of Fourth Amendment expectations.¹³⁹ As a result, there are more searches and stops going on, frisks, than ever before, and people have become accustomed to it.¹⁴⁰

The proponents of these kinds of what I consider transgressions of the Fourth Amendment have been very successful because the public now accepts it. You will hear over and over again, “El Al¹⁴¹ is wonderful because they seal the cockpit prior to any passengers boarding the plane. Why don’t we do that?” One of the reasons we do not do some of these things is because it is not in our tradition.

So the real question becomes: Five years from now are those traditions going to be radically changed because of things like September 11th?

MR. ZOUBEK: I think that one of the things we have to keep in mind in terms of this balance is we have to recognize—and this does redefine, perhaps, the civil liberties debate in this country—is that we are talking about a threat that is based upon whether or not we have the right to exist as a nation.

You review the Osama bin Laden tapes and he states “we hit her with the first hit and the next one we will hit her with the hands of the believers, the good believers, the strong believers.” Underlying this threat is the belief that our society with all that it stands for should not exist.¹⁴²

¹³⁹ See Jennifer L. Malin, Comment, *Veronica School District 47J Action: A Further Erosion of the Fourth Amendment*, 62 BROOKLYN L. REV. 469, 486–518 (1996).

¹⁴⁰ See, e.g., Kathleen Parker, *If You’re Not Paranoid, You’re Not Paying Attention*, ORLANDO SENTINEL, Nov. 20, 2002.

¹⁴¹ El Al is the national airline of Israel. See David K. Li & Uri Dan, *L.A. Airport Bloodbath: How Maniac Met His End Feds Tried to Boot Gunman, but Wife’s Visa Kept Him Here*, N.Y. POST, July 7, 2002, at 8.

¹⁴² *Transcript of Osama bin Laden Videotape*, CNN Transcripts, at <http://www.cnn.com/2001/US/12/13/tape.transcript> (Dec. 13, 2001) (providing a translated transcript of a videotape of Osama bin Laden issued by the U.S. Department of Defense).

That is why the public's expectations are different now, that is why the balance is going to be different, and that is why I think some of the arguments that you may have been in a position to make in prior years are going to be more difficult to make.

MR. SIEGEL: Possibly we will not make some of those arguments. We are aware of that.

QUESTIONER: I have two questions, and they are both related to what you are talking about.

I have heard the negative arguments of what you are not looking to do, not looking to racial profile. That sounds very good to me.

The first question is: What are the affirmative routes for identifying the other-than-terrorist organizations—maybe militia groups, or criminal records from domestic violence crimes? Are those routes from which you would be possibly pulling information?

The second question is: Having taken an international flight and seeing increased security, where people were pulled aside and searched, the people pulling them aside and doing the searches are getting paid minimum wage, or maybe double minimum wage, \$9.50 an hour.¹⁴³ So the two people who were searched most strongly were two very attractive, scantily clad women. In a society that pays the athletes themselves millions of dollars to perform, if we are paying the security personnel only \$9.50 an hour, it is not giving them the due respect for the job that they have to do.

How do you address training, support, and financing the people who have to take this responsibility so that they can perform on the level that we are expecting them to perform at?

MR. SQUIRES: As far as training goes, the people who work at Giants Stadium—and I am just speaking for Giants Stadium—I think it is kind of like the people who work at Disney World, where I worked for three years. People bought into that system. That is why they work there. They enjoy working there. I think

¹⁴³ See Brian O'Neill, *Minimum Wage vs. Maximum Security*, POST-GAZETTE (Pittsburgh), Sept. 20, 2001, at B-1.

2003]

LEGAL ISSUES IN SPORTS SECURITY

401

the people who work at Giants Stadium, I would say ninety-five percent of the people are happy.

As a matter of fact, we polled our employees—we call them “team members”—and asked them, given all things, would they come back in 2002; and ninety-six percent of them responded “yes.” So obviously, we are doing something right. I do not think they are all there for the money. I really, really do not, because if they are, they must be in dire straits.

But there are economics. The one thing we can do for them—and it costs—is train. They have come out loud and clear in these surveys that we have done that they want training. We conduct an evacuation drill every year. It costs me a lot of money to bring in 1,500 people an hour and a half earlier to train them. But you know what? You have to do it. You cannot expect to put somebody in a uniform, put them out there and say, “Go figure out what you are supposed to do.” So there is a serious investment there, but that is part of the deal. That is just part of the deal.

That is not saying everybody is getting all the training we want to give them, but it is certainly a step in the right direction.

QUESTIONER: Hello. I have a question for Mr. Ahlerich.

I just came back from the Olympics,¹⁴⁴ and my experience there was people were very interested in being searched. It was a very positive experience.

And what I am wondering is: What is your organization doing to collaborate and share Best Practices back and forth, because the impact if any one of these types of sporting events is attacked could be devastating to the rest of the industry?

MR. AHLERICH: Yes. Certainly we have no say over how the NCAA or different universities run their events. I am participating on a committee with the International Association of Assembly Managers. I am sharing the *Best Practices Guide* with them.

¹⁴⁴ The 2002 Olympic Winter Games were held February 8, 2002, through February 24, 2002, in Salt Lake City, Utah. See <http://www.saltlake2002.com> (last visited Mar. 25, 2003).

It is a confidential document, loosely—I mean, we are not putting it on the front page of the newspaper, but it is easily obtained by security professionals and stadium professionals. If they want to see it, we are happy to share it with them.

QUESTIONER: Mr. Squires, have the security searches resulted in any arrests for non-security violations—contraband, anything like that?

MR. SQUIRES: No, they have not. The only situation we did have—and it was not an arrest, it was an apprehension—was the individual who mentioned about the thermos, “Here, honey, take the bomb.”

I will be honest with you. You know, these people are leaving their things in their cars, they really are, or they are disposing of them in the trash cans outside the gates. They have made our job very easy, and they have really bought into it.

And we have done what Paul mentioned before. We got the word out to the public through the media. We sent flyers out with season tickets telling season ticket holders what is permitted and what is not permitted. So, hopefully, we will not find anything.

QUESTIONER: This question is addressed to Mr. Squires and also the NFL. We have spent almost the entire time talking about electronic means. One of the questioners talked about Shea Stadium which was built in the 1960s, and Giants Stadium is twenty-six years old. I am curious as to what is being done architecturally to address the issues of security in these older buildings?

MR. AHLERICH: For the older buildings, certainly the *Best Practices Guide*’s perimeter security is a very important element, and those are hard perimeters. Mr. Squires is one of our biggest believers and best practitioners. It was something that he was doing far in advance of Best Practices being announced.

But it is a harder sell in other locations—”Why do we need Jersey barricades along the street? Why do we need reinforced concrete flower pots, tree pots along the way?” It is a part of the *Best Practices Guide*. We urge even closing the streets at certain times.

2003]

LEGAL ISSUES IN SPORTS SECURITY

403

Ultimately it is a recommendation and an urging, not a requirement, but more and more the bar is being moved in the direction that we are urging. Mr. Squires is already doing it.

PROFESSOR FALLON: Paul Zoubek has some expertise here too.

MR. ZOUBEK: I think one of the things to keep in mind—and it cuts across all types of construction. You are going to see an across-the-board examination of the security needs in terms of the architecture of a building; the way in which the parking is set up;¹⁴⁵ where parking should be, and design changes generally at the entrances and exits to accommodate enhanced security measures.¹⁴⁶ This new look at design and construction is happening across the board, not only in terms of stadiums, but as what has to occur in terms of the construction of buildings and the reinforcement of buildings generally to enhance security.¹⁴⁷

But I think there are going to be significant issues as someone goes out to build a new stadium, in the post-September 11th era, in how it is designed, how to protect against some of those potential threat issues.

PROFESSOR FALLON: On behalf, I am sure, of the audience, I want to thank the panel. I came down from the Boston/Cambridge area for this, just to be able to hear this panel. If my reaction is in any way representative, you have just been terrific, all of you. Thank you.

On behalf of the panel, I also I want to thank the audience. Your questions have been insightful, provocative, and most informative. Thank you.

¹⁴⁵ See, e.g., Tim Barker, *Many Parking Spots Off-Limits; OIA Probably Will Not Open Terminal-Top Spaces or Spaces in Garage Close to the Terminal*, ORLANDO SENTINEL, Nov. 18, 2001, at A26 (describing the post-September 11th FAA mandate prohibiting any vehicle to be left unattended within 300 feet of an airport terminal).

¹⁴⁶ See, e.g., Dan Haerer, *Controlling Access Through Revolving Doors*, Horton Doors, at http://www.hortondoors.com/Articles/body_article1.html (last visited Mar. 16, 2003) (presenting examples of the types of doors that can be used and the types of changes buildings can make to increase security).

¹⁴⁷ See John E. Crawford & Joseph Valancius, *Architecture and Terrorism: More Efficient Modern Engineering Techniques May Result in Less Safe Structures*, FASCNET, at <http://www.fascnet.org/issues/specials/terrorism/buildingdesign.php3> (last visited Mar. 16, 2003).